Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

GUS ALEX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Fifth Amendment Due Process Clause and the Sixth Amendment require that in a prosecution under Section 1962(d) of RICO, jurors must agree unanimously on which two or more acts of racketeering were committed; and whether the Fifth Amendment Due Process Clause requires that a general guilty verdict be reversed when the district court found that the prosecution did not prove 4 of 11 racketeering acts considered by the jury.

II.

Whether an indictment must charge that the defendant agreed personally to commit two acts of racketeering to state a crime under Section 1962(d) of RICO.

III.

Whether a criminal defendant's right of confrontation under the Sixth Amendment supersedes the attorney-client privilege of a government witness with respect to documents which contain statements by the government's witness directly impeaching his testimony on matters central to the charges.

IV.

Whether a district court may impose an upward departure from the RICO sentencing guidelines based on a defendant's involvement in organized crime; and whether a Court of Appeals has the authority to affirm an upward departure on a ground raised as a basis for departure in the district court, but not used by the district court as a basis for departure.

V.

Whether the Fifth Amendment Due Process Clause and 18 U.S.C. § 4241(a) entitle a criminal defendant to a competency hearing when his trial lawyers file detailed affidavits attesting to his lack of competence, and medical and psychiatric experts also question his competence to stand trial.

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No.

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GUS ALEX,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gus Alex respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which affirmed Mr. Alex's conviction and sentence.[1]

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[1] The parties listed in the caption were the only parties to the judgment in the court below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit affirming Mr. Alex's conviction and sentence is reported as *United States* v. *Rainone, et al.*, 32 F.3d 1203 (7th Cir. 1994). (Pet. App. 1a-10a.)[2] The decision of the United States Court of Appeals for the Seventh Circuit denying rehearing and rehearing *en banc* is unreported and is reproduced in the Appendix attached to this Petition. (Pet. App. 49a-50a.)

JURISDICTION

The Seventh Circuit issued its written opinion and judgment affirming Mr. Alex's conviction and sentence on August 23, 1994. On November 7, 1994, the Seventh Circuit entered an order denying Mr. Alex's petition for rehearing, with suggestion of rehearing *en banc*. Petitioner Alex invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) (1988) to review the judgment of the Seventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, the pertinent portions of which are set forth below:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Constitution, Amendment V.

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

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[2] "Pet. App. ____" refers to the Appendix bound with this Petition.

Constitution, Amendment VI.

This case also involves the following provisions of the United States Code:

18 U.S.C. § 1961(5) (1988) provides:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1962(c) (1988) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) (1988) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 4241(a) (1988) provides:

> At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering

> from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

STATEMENT OF THE CASE[3]

A. The Indictment

On December 18, 1991, a federal grand jury sitting in the Northern District of Illinois returned a six-count indictment against Gus Alex and co-defendants Leonard Patrick, Mario Rainone, and Nicholas Gio. Alex was charged in Counts One and Four. Count One alleged conspiracy to further the affairs of an enterprise known as the "Lenny Patrick Street Crew" through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d), and incorporated by reference the 11 racketeering acts set forth in Count Two.[4] Count Four alleged a conspiracy to extort cash payments from Myron & Phil's restaurant in Lincolnwood, Illinois, in violation of 18 U.S.C. § 1951. Alex and Gio went to trial; Rainone and Patrick pled guilty.

The District Court for the Northern District of Illinois had jurisdiction over this case under 18 U.S.C. § 3231.

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[3] "Tr. __" refers to the consecutively numbered pages of the trial transcript; "Tr. V.__, p. __" refers to the volume and page numbers of pre and post trial proceedings below. "App. __" refers to the separately bound appendix filed with Mr. Alex's Seventh Circuit Brief.

[4] Count Two charged Gio, Patrick and Rainone with a violation of Section 1962(c) of RICO.

B. Motion To Dismiss Count One

On February 14, 1992, Alex moved to dismiss Count One on the ground that it failed to allege that he agreed personally to commit at least two predicate acts of racketeering. The motion was denied on April 17, 1992. (Pet. App. 12a-14a.)

C. Pretrial Proceedings On Alex's Competency To Stand Trial

On April 3, 1992, one of Alex's trial lawyers informed the court and the prosecutor that he doubted whether Alex understood the proceedings against him; that a psychologist had diagnosed Alex as suffering from progressive organic brain disease; and that he anticipated filing a motion asserting Alex's incompetency to stand trial. (Tr. V. 7, pp. 10-11.) The prosecution requested a court-ordered physical, neurological, and psychological examination of Alex pursuant to 18 U.S.C. § 4241(b).

Experts for both the defense and the prosecution examined Alex, who was 76 years old at the time, to assess his competency to stand trial. Dr. Howard D. Simon, the government's neurologist, concluded that Mr. Alex "would be able to help with his defense to some degree" and that "I do not think that his findings are so severe to preclude his understanding the nature of the consequences of the proceedings against him," but that "Mr. Alex has an organic brain syndrome and a moderate dementia, probably best classified as an early senile dementia of the Alzheimer type" which "would limit insight to some degree." (App. 124-25.) Dr. Jack Arbit, the defense psychologist, concluded that Mr. Alex suffered from a "progressive organic brain dysfunction" impairing the memory and cognitive systems. (App. 102-03.) Dr. Steven Rothke, the prosecution's psychologist, pointed out the need for "a more aggressive approach to neurodiagnostic testing," and that there was "insufficient data to conclude" that Mr. Alex was incompetent. (App. 128.) Dr. Jacob H. Fox, the defense neurologist, concluded that "Mr. Alex has

neurological and cognitive performance which is within normal limits." (App. 135-36.)

On April 24, 1992, the court issued an order finding Alex mentally competent to stand trial, and cancelling a scheduled evidentiary hearing to determine competency. (Pet. App. 15a-17a.) The court concluded that, based on the neurological and psychological reports submitted by the parties, "there is no reasonable cause to believe that Alex is incompetent and . . . an evidentiary hearing on defendant Alex's competency is unnecessary." (Pet. App. 17a.)

Alex's trial lawyers, Carl Walsh and Sam Adam, filed a motion to reconsider the order denying the evidentiary hearing, submitting in support their own affidavits setting forth in detail why in their opinions Alex could not competently assist in the preparation of his defense.[5] Adam stated in his affidavit that in 30 years of practice he could "not recall ever representing anyone so grossly incapable of assisting in his defense as Mr. Alex is"; that Alex was unable to describe the charges against him or to remember the events alleged therein; and that he found Alex to be "incapable of a relevant response to questions put to him concerning the charges in the indictment" and "almost totally out of touch with the reality of his present dilemma other than the general idea that soon he will be on trial on charges which [he] does not and cannot understand." (Pet. App. 55a-57a.)

Alex's other lawyer, Carl Walsh, stated in his affidavit that he has known Alex for over 30 years, and has observed a gradual deterioration in Alex's mental abilities in the past 8 years, including memory loss and lack of concentration. Mr. Walsh recounted an occasion on which Alex was delusional, and was informed of another occasion on which Alex could not recognize his wife. Mr. Walsh concluded that based upon his conversations with Alex, Alex

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[5] The two affidavits are reproduced in their entirety in the Appendix. (Pet. App. 51a-57a.)

did not understand the indictment, had no memory of the events alleged therein and could not competently answer questions. (Pet. App. 51a-54a.)

The court struck the affidavits of the two trial lawyers, and denied Alex's motion to reconsider. (Pet. App. 18a.) The court questioned the "propriety" of Alex's lawyers giving affidavits: ". . . you can't be a witness and an attorney in the case too." (Pet. App. 19a.)

D. Evidence Introduced At Trial

The prosecution introduced evidence that from 1983 to 1989, the Patrick street crew extorted or attempted to extort money from individuals and legitimate and illegitimate businesses. Leonard Patrick provided the only direct evidence linking Alex to the crimes. Patrick testified that he had met with Alex on business matters since the mid-1950s; that as head of the street crew, he reported to Alex; and that between 1983 and 1989, he and Alex met at several locations so Patrick could obtain Alex's approval for certain schemes and to deliver proceeds from the schemes to Alex.

The prosecution introduced a tape recording and transcript of a December 4, 1989 conversation between Patrick and Alex, which Patrick recorded while wearing a concealed recording device (Tr. 873, 1097), and Patrick gave a line-by-line interpretation of the tape (Tr. 1097-1119). Patrick testified that during the meeting he gave Alex "4400 for October and November," which according to Patrick represented extortion proceeds.

Three other witnesses testified about Alex, but they did not implicate Alex in any of the racketeering acts.

E. Hearing And Ruling Prohibiting Cross Examination Concerning Documents Produced By David Mejia

After the prosecution's direct examination of Patrick, Alex's lawyer attempted to cross examine Patrick with documents that had been obtained by subpoena from Patrick's former attorney David Mejia. (Tr. 1312-14.) The prosecution objected to the use of these documents, whereupon the court aborted the cross examination and held a hearing out of the jury's presence as to whether the documents were privileged attorney-client communications between Patrick and Mejia. (Tr. V. 35.) During the hearing, only one of five relevant documents was marked as an exhibit, and this was the only one about which the prosecution elicited testimony; Patrick testified that he did not recall preparing it or discussing it with Mejia (Tr. 1504-05; 1518); no one testified regarding the circumstances under which it was prepared or why it was prepared.

At the conclusion of the hearing, the court ruled that the documents were protected by Patrick's attorney-client privilege, that counsel for Alex could not cross examine Patrick with the documents, that counsel for Alex could make an offer of proof, and that the documents and the offer of proof be sealed. (Pet. App. 21a-26a.) (As counsel for Alex, we had access to the offer of proof, under seal in the record in the Court of Appeals, but not the actual "Mejia documents" themselves. In his Brief in the Court of Appeals, also filed under seal, Mr. Alex set forth in detail (at pp. 23-30) both the contents of the documents as described in the offer of proof and their use to impeach Patrick. On directions from the Clerk of this Court, Mr. Alex's Seventh Circuit Brief has been lodged under seal with the Clerk and is available for review. In Reason for Granting the Writ III (at pp. 17-19), we demonstrate how Patrick's statements as reflected in the offer of proof describing the Mejia documents impeached his trial testimony, but without disclosing the content of the supposedly privileged communications.)

F. The Jury Instructions And Verdict

When Mr. Alex's lawyers tendered proposed jury instructions, the district court refused Alex's request to instruct the jury that, to convict Alex of conspiracy to violate § 1962(c), the jury must unanimously agree on "at least two specific racketeering acts that all of you believe the defendant agreed that some member of the alleged conspiracy would commit." (App. 198.) However, the district court instructed the jury that, in order to convict defendant Gio of a substantive violation of § 1962(c) on Count Two, "the government must prove, beyond a reasonable doubt, that the defendant committed or wilfully caused the commission of two acts of racketeering activity," and "you must unanimously agree as to which two acts are proven as to each defendant." (Tr. 2458.) The district court provided the jury with a copy of the indictment and identified by name the acts of racketeering identified by number in Count Two of the indictment (Tr. 2470-71); this instruction allowed the jury to consider all 11 predicate acts set forth in Count Two of the indictment on the Section 1962(d) charge (Count One) against Alex.

On October 1, 1992, the jury found Alex guilty on Counts One and Four. The verdict was general, did not specify which racketeering acts were found to have been committed as to Count One, and indicated neither whether Alex committed the acts himself nor whether the jury *unanimously* agreed as to whether 2 or more of the 11 alleged acts had been committed.

G. Sentencing

The district court applied the 1987 version of the United States Sentencing Guidelines, and calculated an offense level of 32 for Count One, which reflected the base offense level of 19 applicable to RICO offenses, plus upward adjustments applicable under the guidelines. (Pet. App. 31a-48a.) In computing the offense level of 32 (121 to 157 months) for Count One, the district

court considered only 7 of the 11 predicate acts, stating (Pet. App. 35a):

> After observing all the evidence and reviewing the case, the Court found that it would have convicted the defendant [Alex] of conspiracy to commit the seven [out of 11] underlying acts of racketeering alleged in Count One listed below.

The government filed a motion seeking an upward departure on four grounds: "[1] use of threats of bodily injury . . . [2] threats to family members . . . [3] organized crime, and . . . [4] offenses not accounted for by the combined offense level." (App. 219.) The district court imposed a two-level upward departure based upon two of the requested grounds - threats to the victims' family members, and Alex's organized crime involvement -resulting in a final adjusted offense level of 34 (151 to 188 months). The court then sentenced Alex, who never had been convicted of a crime previously, to concurrent terms of 188 months (15 years, 8 months) imprisonment on each count, as well as a fine, a forfeiture, and restitution totalling $823,000. (Pet. App. 45a-46a.)

H. The Appeal

Alex appealed to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals issued its written opinion and judgment affirming Alex's conviction and sentence on August 23, 1994. Alex raised seven issues on appeal, five of which are the subject of this Petition. As to these five issues, the Seventh Circuit:

> (a) failed to address the question (although it was fully briefed by the parties) whether the Fifth Amendment Due Process Clause and the Sixth Amendment entitled Alex to an instruction requiring unanimous agreement on which predicate acts Alex agreed some member of the conspiracy would commit, or whether a general

jury verdict of guilty may stand when it may be based upon charges the district court found were not proven;

(b) did not consider or discuss the question (also fully briefed) whether the district court erred when it refused to dismiss Count One of the indictment because it failed to allege that Alex agreed personally to commit at least two predicate acts of racketeering;

(c) held that the district court did not abuse its discretion when it decided that the so-called "Mejia documents" were privileged, and that, under the circumstances presented here, Alex's Sixth Amendment right of confrontation did not supersede Patrick's attorney-client privilege;

(d) affirmed the upward departure on the basis of a ground other than the one used by the district court (threats of bodily injury to the victims), which the district court had implicitly rejected, but without acknowledging that they had changed the basis for departure; and, as to the alternate ground, concluded that the Sentencing Commission did not consider organized crime when it drafted the RICO guidelines; and

(e) held that the district court did not err in refusing to hold a competency hearing, even though the district court struck the detailed affidavits of Alex's two trial lawyers (these affidavits are not even mentioned in the Court of Appeals' opinion) which, together with the reports of several experts, raised serious doubts as to Alex's competency to stand trial.

REASONS FOR GRANTING THE WRIT

This case merits review by this Court because it presents three important constitutional issues, two topical questions under the Sentencing Guidelines and one issue on which the circuit courts have divided. It affords this Court an opportunity to address and clarify several questions about criminal RICO conspiracy cases, which have divided lower courts. The Court of Appeals avoided most of the serious problems presented in the appeal by the simple

expedients of ignoring them altogether (the issues relating to the sufficiency of Count One of the indictment, the jury instructions, and the lawyers' affidavits regarding Alex's competency), or by misstating the record (the import of the documents refused to the defense for cross examination of Patrick, and one of the bases for the upward departure). The opinion below is, to put it bluntly, incomplete, inaccurate, slanted and misleading. Mr. Alex, who had never been convicted previously and who is facing imprisonment for the balance of his life (he is now 79), is deserving of a better quality of justice. The underlying issues presented here deserve full and fair review, which they have not received. The conflicts between the Court of Appeals' opinion and established law warrant exercise of this Court's power to issue a writ of certiorari.

I.

THE JURY INSTRUCTION ERROR, WHICH LED TO A CONSTITUTIONALLY DEFECTIVE JURY VERDICT.

The prosecution and the district court agreed that, to convict Alex of conspiracy to violate RICO under 18 U.S.C. § 1962(d), Count One, the instructions required the prosecution to prove that the defendant agreed to the commission of two of the predicate acts alleged in the indictment. (Tr. 2458-59.) Nevertheless, the district court refused Alex's request that the jury be instructed that all 12 jurors had to agree *unanimously* on which two predicate acts Alex agreed some member of the conspiracy would commit. (Pet. App. 27a-30a.) Inconsistently, the judge instructed the jury that they had to be unanimous about the two predicate acts involved in Count Two against defendant Gio, involving a substantive RICO charge under Section 1962(c). (Tr. 2458.)

The jury returned a general verdict of guilty against Alex on Count One, without specifying which predicate acts it found proven, and without indicating whether or not any two acts were found by unanimous agreement. At sentencing time, the district court found

that 4 of the 11 predicate acts alleged in Count Two, incorporated by reference in Count One, were not established by sufficient proof. (Pet. App. 35a.) This leads to the following fundamental legal problems with the instructions and verdict, none of which were addressed by the Court of Appeals:

First, unanimity *is* required as to predicate acts under Section 1962(d), just as with Section 1962(c). No case to our knowledge holds otherwise;[6] we are aware of several cases in which Section 1962(d) unanimity instructions have been given.[7] There is no principled reason to differentiate between the two statutes and to allow the 12 jurors to split their votes among the alleged predicate acts in a Section 1962(d) case; the jury should be so instructed.

Second, the jury may have found Alex guilty on Count One based on less than unanimous agreement as to which two predicate acts were proven (for example, 7 jurors may have found acts 1 and 2 proven, and 5 may have found acts 3 and 4 proven). Where, as here, jurors are not required to reach unanimous agreement on the elements of the crime, the verdict offends the Constitution. The

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[6] Our research has uncovered only one decision where this issue is discussed, *United States* v. *Cauble*, 706 F.2d 1322, 1345 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984), in which the court held that absent an objection, the trial court was not required to give a unanimity instruction in a RICO prosecution brought under each subsection of Section 1962. The court noted that giving the instruction "might have been better practice" and that "had trial counsel made such a request the trial judge would have been able to consider it and likely would have granted it." Unlike *Cauble*, Alex objected at trial and tendered an instruction which required unanimity.

[7] *United States* v. *Infelise*, No. 90-CR-87 and *United States* v. *Carlisi*, No. 92-CR-1064, both tried in the Northern District of Illinois. Mr. Alex attached these instructions as an Appendix to his reply brief in the Court of Appeals.

Fifth Amendment Due Process Clause requires that the prosecution prove all elements of the charged offense, *Patterson v. New York*, 432 U.S. 197, 210 (1977), and that the jury find "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged," *In re Winship*, 397 U.S. 358, 364 (1970). The Sixth Amendment requires the jury's verdict to be unanimous. *Andres* v. *United States*, 333 U.S. 740, 748 (1948). See also *Sullivan* v. *Louisiana*, ___ U.S. ___, ___, 113 S. Ct. 2078, 2081 (1993) (to satisfy the Sixth Amendment, jury verdict must be "guilty beyond a reasonable doubt"). The verdict in this case does not satisfy the Constitution because the jurors were not required to agree unanimously that the prosecution proved an element of the crime, in this case the predicate acts, beyond a reasonable doubt.

Third, even assuming for purposes of argument that the jury reached unanimous agreement on two predicate acts, the jury may have agreed on one or more of the four predicate acts which the district court at sentencing found to be unsupported by adequate evidence. One of the 11 predicate acts was the basis for Count Four, of which the jury convicted Alex. Of the remaining 10 predicate acts, the district court found the government's proof insufficient as to 4. Thus, assuming that the jury reached unanimous agreement on 2 predicate acts (without considering the other 9 acts), there is a 40% likelihood that a factually insufficient predicate formed the basis for the verdict on Count One.

This raises the question, not answered by this Court, whether a RICO conviction must be reversed if it is based on a general jury verdict which may in turn be based on unproven essential charges. Compare *United States* v. *Brown*, 583 F.2d 659, 669-70 (3d Cir. 1978), *cert. denied sub nom.*, *Greenblatt* v. *United States*, 440 U.S. 909 (1979) (court reversed RICO conviction based on factually insufficient predicate act) and *United States* v. *Bertoli*, 854 F. Supp. 975, 1069 (D. N.J.), *vacated in part on other grounds*, 40 F.3d 1384 (3d Cir. 1994) (in overruling defendant's objection to a special verdict form in RICO case, court stated that *Brown* requires that "the

evidence must be sufficient to prove *all* of those [predicate] offenses [with which the defendant is charged].") (emphasis in original) with *United States* v. *Vastola*, 989 F.2d 1318, 1329-31 (3d Cir. 1993) (court refused to follow *Brown* and declined to reverse RICO conviction based on factual insufficiency of predicate act).

Griffin v. *United States*, 502 U.S. 46, 112 S. Ct. 466 (1991), cited by the government in the Seventh Circuit, is not on point and does not resolve this issue. In *Griffin*, the indictment charged the defendant with conspiracy to impair the efforts of the Internal Revenue Service and to impair the efforts of the Drug Enforcement Administration. 502 U.S. at ___, 112 S. Ct. at 468. Relying on *Turner* v. *United States*, 396 U.S. 398, 420 (1970), this Court held that the government's failure to prove one of the two objects did not require reversal of the general verdict. 502 U.S. at ___, 112 S. Ct. at 472-74. *Griffin* was not a RICO case and therefore did not address the question presented here - whether the factual insufficiency of some of the predicate acts supporting the "pattern of racketeering activity" element requires reversal of a general guilty verdict. The difference between *Griffin* and this case is that, unlike *Griffin*, the instruction given here permitted the jury to choose any 2 of 11 possible predicate acts and allowed the jury to convict Alex notwithstanding disagreement among themselves as to which predicate acts the government proved. The freedom given the jury to select among 11 alternatives, and the absence of evidence in the record such as a special verdict form, make it impossible for this Court to conclude that the jurors agreed unanimously on a factually sufficient predicate.

Difficult as it may be to believe, these interesting, important questions were *completely ignored* by the Court of Appeals, even though they were fully briefed and argued orally by the parties. The Court of Appeals did not even mention any of these issues specifically. It simply and erroneously said, "The other issues relating to guilt are either resolved by decisions of this court that we are not disposed to reexamine or have no possible merit. . . ."

(Pet. App. 8a [32 F.3d at 1208].) The issues relating to the instruction and verdict surely warrant review by this Court.

II.

THE ERROR IN REFUSING TO DISMISS COUNT ONE.

Alex's counsel moved to dismiss Count One on the ground that it failed to allege that Alex personally agreed to commit two predicate acts. (App. 83.) The district court denied the motion based on *United States* v. *Neapolitan*, 791 F.2d 489, 494-500 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986), where the Seventh Circuit held that a RICO conspiracy indictment need only allege that the defendant agreed that two predicate acts be committed by some member of the conspiracy. (Pet. App. 13a-14a.) Alex raised the issue on appeal, but the Seventh Circuit refused to reconsider the *Neapolitan* decision. (Pet. App. 8a [32 F.3d at 1208].)

This is an important question on which the Courts of Appeals are in conflict. The First, Second, Fifth and Tenth Circuits hold that Section 1962(d) requires the government to prove that the defendant conspired to participate in the enterprise's affairs by personally agreeing to commit two acts constituting a pattern of racketeering activity.[8] The Third, Fourth, Sixth, Eighth, Ninth and Eleventh Circuits agree with the Seventh Circuit that the indictment need only allege that the defendant agreed that some member of the conspiracy

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[8] *United States* v. *Killip*, 819 F.2d 1542, 1547-48 (10th Cir.), *cert. denied sub nom.*, *Marr* v. *United States*, 484 U.S. 865 (1987); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom.*, *Rabito* v. *United States*, 469 U.S. 831 (1984); *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); *United States* v. *Martino*, 648 F.2d 367, 383 (5th Cir.), *vacated in part*, 650 F.2d 651 (1981), *cert. denied*, 456 U.S. 949 (1982).

will violate Section 1962(c) through the commission of two predicate acts.[9]

The requirement that the defendant personally agree to commit two racketeering acts was intended by Congress to "provide sufficient protection to those who might otherwise be convicted through guilt by association." *Winter*, 663 F.2d at 1136. Section 1962(c) requires proof that the defendant committed at least two predicate acts. We submit that the better-reasoned rule is that a conspiracy to violate Section 1962(c) requires proof that the defendant agreed personally to commit at least two predicate acts. In any event, this is an important question which this Court should now resolve.

III.

THE SIXTH AMENDMENT CONFRONTATION ISSUE.

The interplay between a defendant's Sixth Amendment right of confrontation and a witness's attorney-client privilege has not been considered by this Court. A closely related issue was ruled on in *Davis* v. *Alaska*, 415 U.S. 308, 320 (1974), in which this Court held that a state statutory privilege was superseded by a criminal defendant's right of confrontation. Several federal and other courts have recognized that under appropriate circumstances the right of

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[9] *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990); *United States v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1987); *United States* v. *Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States* v. *Adams*, 759 F.2d 1099, 1115-16 (3rd Cir.), *cert. denied*, 474 U.S. 971 (1985); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir.), *cert. denied*, 469 U.S. 845 (1984); *United States* v. *Carter*, 721 F.2d 1514, 1529-31 (11th Cir.), *cert. denied sub nom.*, *Morris* v. *United States*, 469 U.S. 819 (1984).

confrontation may override the attorney-client privilege,[10] but none has found that the facts warranted reversal.

The Court of Appeals addressed the legal part of this issue (Pet. App. 4a), but by ignoring the potentially devastating impact of the supposedly privileged impeaching material, avoided coming to grips with the real problem: whether, in light of the facts here, Alex's Sixth Amendment right of confrontation should override Patrick's claim of attorney-client privilege. The Court of Appeals admitted that Patrick's claim of privilege is questionable because he did not raise it - the government did - but ignored the fact that the district court failed to conduct the required document-by-document analysis to justify a finding that the privilege exists. *Holifield* v. *United States*, 909 F.2d 201, 204 (7th Cir. 1990).

The long and short of the matter is that the withheld, allegedly privileged documents contained material which undermined the prosecution's crucial witness, Patrick, on a number of the indictment charges. Patrick admitted to a life of crime and to being a thoroughly despicable person, but he insisted that self-interest in minimizing his own penalty guaranteed the truthfulness of his testimony against Alex. The withheld documents provided the only basis for Alex's lawyers to attack Patrick on the indictment charges, as distinguished from attacks on Patrick's general credibility.

Patrick's pre-trial statements, as reflected in the Mejia documents, directly and forcefully impeach his trial testimony that he received the proceeds from the Myron & Phil extortion, the sole basis for Count Four and one of the predicate acts for Count One. Because Patrick testified that he gave Alex a portion of that money,

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[10] *United States ex rel. Blackwell* v. *Franzen*, 688 F.2d 496, 501-02 (7th Cir. 1982), *cert. denied*, 460 U.S. 1072 (1983); *Jenkins* v. *Wainwright*, 763 F.2d 1390, 1392-93 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986); *Neku* v. *United States*, 620 A.2d 259, 263 (D.C. App.), *cert. denied*, 114 S. Ct. 577 (1993).

material that impeached Patrick's testimony about the source of the funds was critical to Alex's defense. Patrick's assertions in the Mejia documents similarly contradict his testimony that the "4400" - money which he testified to giving Alex during the recorded conversation on December 4, 1989 - represented extortion proceeds. The documents also show FBI coercion of Patrick, and contain other assertions by Patrick directly contrary to his trial testimony on critical matters relevant to the indictment charges. No other such directly impeaching evidence was available to Alex's lawyers.

The final error committed by the Court of Appeals on this issue was its failure to use the proper standard for review of a Sixth Amendment violation, that is, whether the court can say that the error was harmless beyond a reasonable doubt. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986). An error is harmless beyond a reasonable doubt only when the verdict of guilty "was surely unattributable to the error." *Sullivan*, ___ U.S. at ___, 113 S. Ct. at 2081. The government did not, and we submit cannot, sustain its burden to satisfy that test in this case.

These factors - the legal issue of the Sixth Amendment right of confrontation pitted against the attorney-client privilege, the failure of the Court of Appeals to weigh the impact of the impeaching material on Alex's case, the doubtful claim of privilege, and the failure to use the proper standard of review - make this issue an appropriate one for review by this Court.

IV.

THE ERROR REGARDING THE UPWARD DEPARTURE UNDER THE SENTENCING GUIDELINES.

The district court granted a two-level increase in Alex's sentencing offense level on alternate grounds, (1) threats made to members of the families of extortion victims, and (2) membership

in organized crime.[11] (Pet. App. 36a-37a and 44a.) The district court did not depart for two other reasons raised by the government in its motion, threats of bodily injury to victims of the extortions, and offenses not accounted for by the combined offense level.

As to the first alternative, threats made to family members, the Court of Appeals acknowledged that there was no evidence to support the stated ground for departure. (Pet. App. 9a [32 F.3d at 1208].) To uphold the district court, the Court of Appeals *switched* to evidence of threats of bodily injury to the victims themselves. The government raised, but the district court rejected, threats of bodily injury to the victims as a basis for departure. The Court of Appeals in practical effect reversed the district court's exercise of its discretion not to depart for threats of bodily injury. That decision *sub silentio* violates the well-settled principle that the Court of Appeals "lack[s] jurisdiction to review discretionary decisions not to depart," *United States* v. *McFarland*, 37 F.3d 1235, 1237 (7th Cir. 1994), and conflicts with decisions holding that the government has no right to appeal where the district court exercises its discretion not to grant an upward departure. *United States v. Romolo*, 937 F.2d 20, 22 (1st Cir. 1991) ("It is well-settled that, ordinarily, a district court's refusal to depart, regardless of the suggested direction, is not appealable.").

As to the second ground, organized crime membership, the Court of Appeals completely overlooked that the Sentencing Commission provides a mechanism, the grouping analysis, for drastically enhancing sentences in organized crime cases brought under RICO. For example, in Alex's case the grouping analysis raised the offense level from the RICO base of 19 (30 to 37 months)

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[11] The Court of Appeals mistakenly states that there were two 2-level departures, but the district court confirmed that there was only one when he said that there was "an independent two-level departure for each of the grounds that were stated, but handled cumulatively." (Tr. V. 44, pp. 18-19.)

to 32 (121 to 157 months), including an adjustment for being a leader of a criminal enterprise having more than four members. (Pet. App. 35a-44a.) The imposition of the upward departure constituted impermissible double counting, and conflicts with decisions and reasoning in several other cases. *United States* v. *Cammisano*, 917 F.2d 1057, 1063 n.3 (8th Cir. 1990); *United States* v. *Patriarca*, 807 F. Supp. 165, 198-199 (D. Mass. 1992), *vacated on other grounds*, *United States* v. *Carrozza*, 4 F.3d 70, 90 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1644 (1994); *United States* v. *Infelise*, 835 F. Supp. 1466, 1494-96 (N.D. Ill. 1993); and *United States* v. *Marino*, 835 F. Supp. 1501, 1526-27 (N.D. Ill. 1993). This Court should grant the Petition to review these issues.

V.

THE WRONGFUL REFUSAL TO HOLD A COMPETENCY HEARING.

Alex's argument that the district court erred in striking the affidavits of his trial lawyers when it refused to hold a pre-trial competency hearing was brushed aside by the Court of Appeals as "too tenuous to require discussion." (Pet. App. 7a [32 F.3d at 1208].) The district court's ruling conflicts with this Court's decision in *Drope* v. *Missouri*, 420 U.S. 162, 177 n.13 (1975), where this Court stated that "an expressed doubt [as to the defendant's competence] by one with 'the closest contact with the defendant' . . . is unquestionably a factor which should be considered." (citation omitted). In *Medina* v. *California*, ___ U.S. ___, ___, 112 S. Ct. 2572, 2580 (1992), the Court reaffirmed the importance of the lawyer's views on competence when it stated:

> Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and

> defense counsel will often have the best-informed view of the defendant's ability to participate in his defense.

The opinions of Alex's trial lawyers about Alex's competency -- which the district court struck from the record -- are entitled to great weight and by themselves warranted a pre-trial competency hearing under the Due Process Clause of the Fifth Amendment and 18 U.S.C. § 4241(a).

In addition, both the district court and the Court of Appeals disregarded reports of medical and psychological experts which raised serious doubts as to Alex's competency. The Court of Appeals mentioned selected passages from these reports; this conflicts with *Drope*, which prohibits the selective reading of reports assessing competence. As in *Drope*, the record in this case "reveals a failure to give proper weight to the information suggesting incompetence." 420 U.S. at 179. Because the district court "mentioned aspects of the [psychiatric] report suggesting competence" without "mention[ing] the contrary data," it is subject to the same criticism that this Court leveled at the district court in *Drope*. 420 U.S. at 175. This Court should grant the writ to review the district court's failure to hold a competency hearing.

CONCLUSION

For the foregoing reasons, petitioner Gus Alex respectfully requests that this Court grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 92-3154, 93-1585, 93-1586
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIO J. RAINONE, GUS ALEX, and NICHOLAS GIO,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 CR 727-**James H. Alesia,** *Judge*

ARGUED MARCH 30, 1994-DECIDED AUGUST 23, 1994

Before POSNER, *Chief Judge,* MANION, *Circuit Judge,*
and REYNOLDS, *District Judge.*[*]

Those who in these whirling times still genuflect to tradition will be gratified to learn that the "Chicago Outfit," once led by Al Capone himself (see ITT Research Institute & Chicago Crime Commission, *A Study of Organized Crime in Illinois* 36-43 (1971)), was still alive and kicking in the otherwise much changed Chicago of the 1980s. *Organized Crime in Chicago: Hearing before the*

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[*] Hon. John W. Reynolds of the Eastern District of Wisconsin.

Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs, 98th Cong., 1st Sess. 157-96 (1983) (statement of William F. Roemer, Jr., of the Chicago Crime Commission, linking the defendants in this case to Capone, Nitti, Accardo, and other Outfit bosses in an unbroken line of descent). One of its rackets was the protection racket, in which owners of restaurants, automobile dealerships, and other small firms were commanded to make substantial cash payments under threat, if they refused, of the destruction of their property and death and injury to themselves and their families. The racket was conducted at the operating level by the Outfit's "street crews," such as the "Patrick Street Crew," headed by the well-known Outfit member Leonard Patrick. *Organized Crime in Chicago, supra*, at 177. The indictment in this case, handed down in 1991, charged Patrick and two members of his crew, Nicholas Gio and Mario Rainone (the latter being Patrick's second in command), along with Gus Alex, the higher-up in the Outfit (*id.* at 170-71) to whom Patrick reported, with various offenses. The principal one was conspiring to conduct the business of the Patrick Street Crew between 1983 and 1989 through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d), a provision of the RICO (Racketeer Influenced and Corrupt Organizations) statute. The indictment listed as predicate offenses of RICO numerous acts of arson, intimidation, and extortion. Patrick turned state's evidence and testified against the other defendants. In return he was permitted to plead guilty to offenses predating the federal sentencing guidelines and was sentenced to only six years in prison, later increased to seven when he violated the plea agreement by perjuring himself in another case (more on this later). Rainone pleaded guilty without engaging in plea bargaining, while Alex and Gio were convicted by a jury after a trial in 1992. Alex, Gio, and Rainone received prison sentences of 188, 137, and 210 months, respectively. Alex was also fined $250,000, and both he and Rainone were subjected to heavy forfeitures. Each of these three defendants has appealed, though Rainone's appeal is limited to the sentence.

The details of the crimes are not important. Typical is an incident in which Rainone, on the orders of Patrick and with the

approval of Alex, went to a restaurant owned by a man named Moss and demanded $2,000 a month. He told Moss that if he didn't pay "they would find [Moss] in his walk-in freezer." To underscore the threat Rainone punched Moss in the jaw and said, "I know where your family lives. I know how to get your kids." So Moss paid.

The evidence against Alex and Gio was overwhelming. The government's principal witness was Patrick himself, admittedly an unreliable person, as we shall see -- but there was also a highly incriminating tape, testimony by another member of the street crew who had turned state's evidence named LaValley, and testimony by two friends of Patrick and Alex who had carried messages between them because the two mobsters were reluctant to use the phone. Alex and Gio complain that they were unduly limited in their ability to cross-examine Patrick because the district judge refused to allow their lawyers to use in that cross-examination certain documents that they had obtained by subpoena from Patrick's former lawyer, David Mejia. Mejia had represented Patrick up through his guilty plea but afterward they had had a falling out and Patrick had accused Mejia of relaying an offer from Alex to pay Patrick for silence. The subpoena, which Alex's lawyer served on Mejia shortly before the trial, demanded all documents in Mejia's possession relating to Patrick. Mejia turned over a number of documents, including notes that Patrick had written to Mejia while Mejia was representing him. When Alex's lawyer tried to use these notes to impeach Patrick's testimony at trial, the government objected that the notes were protected from disclosure by the attorney-client privilege. The judge conducted an evidentiary hearing, upheld the claim of privilege, and refused to permit the notes to be used in the cross-examination of Patrick. The *government* objected? But it was Patrick's attorney-client privilege, not the government's, and the privilege is of course waivable. The appellants make nothing of this point, however, perhaps because when Patrick testified at the evidentiary hearing and was asked whether he had authorized the turning over of his notes to Alex's counsel he said he had not, thus indicating that he had not waived the privilege.

The judge did not act unreasonably ("abuse his discretion," in the standard jargon) in determining that the notes were indeed protected by the privilege. (On the scope of the privilege, see generally *Fisher v. United States*, 425 U.S. 391, 403-05 (1976), and *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991)). Evidence that the district judge was entitled to credit and did credit established that the notes had been prepared by Patrick at the direction and for the use of his then lawyer, Mejia, that they were in Patrick's case file in Mejia's office when subpoenaed, and that they give Patrick's versions of the acts of which the indictment accused him.

Evidentiary privileges are not absolute, however. Even privileges recognized when the Constitution was written can be trumped by constitutional rights, such as the right of confrontation conferred by the Sixth Amendment and interpreted to include the right of cross-examination. *Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (per curiam); *Davis v. Alaska*, 415 U.S. 308 (1974); John W. Strong, *McCormick on Evidence* § 74.2, at pp. 279-81 (4th ed. 1992). Even the attorney-client privilege, therefore, hallowed as it is, yet not found in the Constitution, might have to yield in a particular case if the right of confrontation, whether in its aspect as the right of cross-examination or in some other aspect, would be violated by enforcing the privilege. So at least dicta in two cases intimate. *United States ex rel. Blackwell v. Franzen*, 688 F.2d 496, 501 (7th Cir. 1982); *Jenkins v. Wainwright*, 763 F.2d 1390, 1392-93 (11th Cir. 1985). But we have difficulty imagining an actual case in which the right to counsel and the attorney-client privilege would clash; they are fundamentally complementary rather than antagonistic. If a defendant knows that his communications with his lawyers can be subpoenaed by his codefendants should he have a falling out with them, and then waved in front of a jury, and then used, having thus lost their privileged status, to convict him of additional crimes, he will be inhibited in communicating with his lawyer, and it will be more difficult for him to prepare an effective defense; the practical value of his Sixth Amendment right to the effective assistance of counsel will therefore be less. At the same time, the government's ability to pry one defendant loose from the

others and induce him to turn state's evidence will be impaired as well, to the detriment of the successful prosecution of complex and sophisticated conspiracies, as in the present case.

As this case also illustrates, the incremental contribution of communications within the scope of the attorney-client privilege to effective cross-examination is likely to be small. The lawyers for Alex and Gio spent three days cross-examining Patrick and brought out among other things that he had committed perjury on a number of occasions, had bribed politicians and police officers, had engaged in extortion and loansharking, and had committed six murders. These things were easy to bring out because Patrick's direct testimony had recounted the activities of his street crew -- activities he had directed. He admitted, what was of course obvious, that he had an enormous incentive to play ball with the government -- that otherwise he would die in prison -- and even admitted that he would lie on the stand in this very case in order to stay out of prison. The jury thus was made well aware that he was a thoroughly reprehensible and unreliable person. The notes he had written to Mejia would have added too little to the picture to warrant abrogating the attorney-client privilege; so at least the district judge was entitled to conclude. One of the notes, for example, states that an FBI agent told Patrick that if he didn't cooperate the government would imprison him with former accomplices who would kill him for having ratted on them. Alex argues that he could have used the note to show that Patrick was coerced into testifying. But since Alex was at such pains to convince the jury that Patrick was a liar, on what ground could he ask the jury to believe, about this improbable threat alone, that Patrick had been telling the truth? Other notes gave discrepant accounts of some of the predicate acts. If asked about them Patrick would have said either that he was lying then and was telling the truth now (he gave many answers of that character) or that he had been confused or unclear; nothing new there. There is no argument that any of the notes were planning documents for perjury or other future crimes, in which event the shield of the attorney-client privilege would, of course, be withdrawn.

The right of cross-examination, whether as a matter of constitutional law or the law of evidence, is not absolute. *Olden v. Kentucky*, 488 U.S. 227, 231-32 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *United States ex rel. Blackwell v. Franzen*, *supra*, 688 F.2d at 500-01. It is limited, at the discretion of the trial judge, in time and scope, and in the nature and amount of evidence that may be used to nail the witness. A trial judge does not violate the Constitution when he limits the scope of cross-examination for a good reason, and here as in the usual case desire to protect the attorney-client privilege was a good reason.

The appeals raise several other issues.

1. Shortly after the trial Patrick perjured himself while testifying against the current boss of the Chicago Outfit, Carlisi, in another case. Under cross-examination about the six murders, which in that trial as in this one were flagged to the jury in an effort to discredit Patrick's testimony, Patrick falsely claimed that one of the murders had been committed in self-defense and so hadn't been murder at all. Alex and Gio describe this perjury as newly discovered evidence of Patrick's utter unreliability, warranting a new trial. Newly discovered it may have been, evidence it may have been, but evidence important enough to warrant a new trial it was not. It is conceded all 'round that Patrick is a liar. Most criminals turned government witnesses are. The motive for this particular lie is obvious and has little if any connection with Patrick's credibility with respect to the issues in this case: he was afraid of being charged with murder. He has in fact since been charged by the State of Illinois with three murders. Newly discovered evidence is not a good ground for a new trial unless the evidence if believed would be likely to change the outcome of the old trial. *United States v. DePriest*, 6 F.3d 1201, 1216-17 (7th Cir. 1993); *United States v. Taglia*, 922 F.2d 413, 415-16 (7th Cir. 1991). Believing that Patrick perjured himself one more time, in an understandable though not justifiable effort to avoid being prosecuted for murder, would not lead a reasonable person to exonerate these defendants.

2. Alex was 75 years old when the case was tried in 1992, and was showing early signs of senile dementia of the Alzheimer's type. Expert reports were submitted to the district judge, but only the government's addressed the statutory standard for competency (18 U.S.C. § 4241(d)), finding that Alex met it; and even one of the reports submitted on behalf of Alex described his "neurological and cognitive performance" as falling "within normal limits." On the basis of the reports the district judge found, not clearly erroneously, that there was no "reasonable cause" to believe that Alex was incompetent to stand trial. The judge therefore properly declined to hold a hearing on the issue. 18 U.S.C. § 4241(a). Alex argues that even if that decision was correct (which he questions, but on grounds too tenuous to require discussion), his lawyer should have been permitted at trial to ask the two go-betweens their impressions of Alex's alertness and gait during the period of the conspiracy, to support the defense that Alex lacked the mental capacity, limited as it is, required to join a conspiracy. The judge was entitled to bar the defense and thus exclude this evidence. A defendant is not entitled to have the jury consider a defense for which there is no probative evidence, *United States v. Patrick*, 542 F.2d 381, 386 (7th Cir. 1976) (our same Patrick); *United States v. Andrus*, 775 F.2d 825, 850 (7th Cir. 1985); *United States v. Tanner*, 941 F.2d 574, 587 (7th Cir. 1991), and that was the case with respect to Alex's defense that he was incapable of forming the intent necessary to be guilty of participating in a RICO conspiracy.

It is true that such a defense is not the same thing as a defense of insanity or mental incompetence. Indeed it is not really a defense at all, but an effort to derail the government's attempt to prove whatever mental element the criminal statute that it is enforcing requires. See generally *Haas v. Abrahamson*, 910 F.2d 384 (7th Cir. 1990). But in this case the issues of intent and competence merge. Alex wanted the jury to infer, with the aid of the go-betweens' excluded testimony, his inability to form the required intent from the evidence of early Alzheimer's that he had presented at the competency hearing. This was an exercise in futility. He was trying to make time run backwards. For senile dementia is a progressive disease. If Alex was competent to stand

trial in 1992, he must have been competent to conspire with Patrick and the others years earlier, whatever a couple of his friends might have thought. We add that a tape recording of a conversation that he had with Patrick during the period of the conspiracy reveals no mental incapacity.

The other issues relating to guilt are either resolved by decisions of this court that we are not disposed to reexamine or have no possible merit, and we turn therefore to the sentencing issues.

3. Was a two-level upward departure from the normal guidelines range for persons convicted of participating in a RICO conspiracy warranted because of threats made by the defendants against the victims of their extortion and the members of the victims' families? A subsequent amendment to the guidelines authorizes a two-level adjustment for threats of bodily injury and death, U.S.S.G. § 2B3.2(b)(1), and a subsequent amendment is an appropriate guide for a departure in sentencing a defendant under an earlier guideline. *United States v. Boula*, 997 F.2d 263, 267 (7th Cir. 1993); *United States v. Harotunian*, 920 F.2d 1040, 1046 (1st Cir. 1990). The addition of the adjustment shows that the previous guideline omitted a factor relevant to sentencing under the scheme of the guidelines, and it is precisely (and only) such an omission that is a proper basis for a departure. 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0; *United States v. Schweihs*, 971 F.2d 1302, 1316-17 (7th Cir. 1992). It can make no difference that the threats against the members of the families of the extortion victims were not communicated directly to those family members. The guidelines do imply that a threat of which the threatened person remains ignorant is not a basis for an upward adjustment or upward departure, see U.S.S.G. § 2B3.1, Application Note 6; § 2B3.2, Application Note 2; *United States v. Wint*, 974 F.2d 961 (8th Cir. 1992), and there is no indication that the victims of the defendants' extortions told their families about the threats. But it does not matter. The extortion victims themselves, such as Moss, were also threatened with physical injury; the mention of their families merely magnified the threats.

4. The judge departed upward another two levels because the defendants were engaged in "organized crime." Concern with the penetration of legitimate businesses by criminal syndicates, such as the Chicago Outfit, was a principal motivation for the RICO statute, *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1173 (1993), and "racketeering" is a frequent synonym for the characteristic activities of such syndicates. These observations fuel the defendants' contention that the base offense level of 19 that the Sentencing Commission assigned to RICO convictions reflects the greater gravity of criminal activities engaged in by criminal syndicates, so that a departure upward when the defendant was part of such a syndicate would be double counting. We do not agree. The motivation for and the scope of a statute are often and here different things. The term "racketeering activity" in the RICO statute is a defined term, and the definition is remote from the ordinary-language meaning; all it means is committing one of a number of specified criminal acts. 18 U.S.C. § 1961(1). For conviction, it is true, some minimum structure is required (in addition to a "pattern" of racketeering activity, 18 U.S.C. § 1962) -- an "enterprise" is required, 18 U.S.C. § 1961(4). But the "enterprise" need be nothing more than a small, informal gang, as in *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992), and *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991), having minimum structure and continuity; or a lawful enterprise turned to a corrupt end by a corrupt manager, as in *United States v. Robinson*, 8 F.3d 398, 406-07 (7th Cir. 1993), and many other cases. We deal here with a criminal syndicate of extensive scope and extraordinary durability -- one of the oldest and most notorious criminal enterprises in the United States. Had the guideline range for RICO offenses been set with the Chicago Outfit in mind, it would have greatly overpunished the run of the mill criminal activities that are the routine grist of RICO prosecutions.

We grant that the term "organized crime" is nebulous, and that there are dangers in too casually attaching the appellation to gangs that happen to seem particularly ominous. But we need not explore the outer bounds of the permissible "organized crime" departure in this case. The Chicago Outfit is the clearest possible

example of a gang operating on such a scale, with such success, over such a long period of time that the danger which it poses to society is not adequately reflected in the guideline range. It is not your average criminal RICO violator.

5. Gio committed arson in a caper with LaValley, for which he was convicted. *United States v. Gio*, 7 F.3d 1279 (7th Cir. 1993). If the arson was conduct "related" to the RICO conspiracy, the judge would have had to make Gio's sentence for the conspiracy run concurrently with his 63-month sentence for that arson, rather than consecutively, pursuant to a provision, since deleted, in the version of U.S.S.G. § 5G1.3 under which Gio was sentenced. Although Gio obtained Patrick's permission to commit the arson -- obtained it through Rainone, who even supplied Gio with a hand grenade with which to commit it -- this did not make it an Outfit job. It is commonplace in legal enterprises, and so far as the record discloses in the Chicago Outfit as well, for a subordinate to ask his superior's permission to engage in outside activities. Otherwise a vacation would be a form of work if the employee needed permission from his employer to take it. Gio did not share the gains from the job with Alex, Patrick, or any other Outfit figure -- even, so far as the record shows, Rainone -- other than, of course, his coventurer, LaValley.

AFFIRMED.

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 92-3154, 93-1585, 93-1586
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIO J. RAINONE, GUS ALEX, and NICHOLAS GIO,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 CR 727-**James H. Alesia,** *Judge*

ARGUED MARCH 30, 1994-DECIDED AUGUST 23, 1994

Before POSNER, *Chief Judge,* MANION, *Circuit Judge,*
and REYNOLDS[**], *District Judge.*

JUDGMENT

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

[**] The Honorable John W. Reynolds, of the Eastern District of Wisconsin, is sitting by designation.

In the United States District Court,
Northern District of Illinois

Case Number 91 CR 727

[Minute Order entered by Judge James H. Alesia on
April 17, 1992]

* * *

(*This order concerns defendant 2.) The following motions of Alex are granted: motion for early return of trial subpoenas; motion to require notice of 404(b) evidence; & motion for disclosure under Fed. R. Evid. 609, 803(24), 804(b)(5), & 1006. The following motions are denied: motion for a witness list; motion to dismiss Count One; & motion to require notice of 608(b) evidence. The following motions are denied as moot: motion to preserve agents' notes; & motion for disclosure under Fed. R. Evid. 801(d)(2)(C), (D) & (E). The following motions are denied in part as moot & because Alex is not entitled to information requested: motion for a bill of particulars; & motion to produce witness statements. The following motions are granted in part & denied in part: motion for data regarding opinion testimony; & motion for disclosure of impeaching and exculpatory information. Federal agents' rough notes must be submitted *in camera* by the government on 4/27/92.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 91 CR 727
	)	
GUS ALEX, *et al.*,	)	Judge James H. Alesia
Defendants.	)	

ORDER

Now before the court are various pretrial motions filed by defendant Gus Alex ("Alex"). The government filed a consolidated response. Alex filed a consolidated reply. The court addresses each of the motions separately.

* * *

V. **Motion to Dismiss Count One**

Alex filed a motion to dismiss Count One of the indictment for two reasons. First, he argues that the RICO statute is unconstitutional, vague and overbroad. Second, he argues that Count One fails to state an offense against him because it does not allege that he agreed to commit two or more racketeering acts. Both arguments are wholly without merit.

As an initial matter, we summarily reject Alex's argument that the RICO conspiracy statute is unconstitutional. Numerous authorities have considered and rejected this argument. *United States v. Glecier*, 923 F.2d 496, 497 n.1 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 54 (1991); *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2019 (1991); *United States v. Aleman*, 609 F.2d 298, 305 (7th Cir. 1979),

cert. denied, 445 U.S. 946 (1980); *United States v. Angiulo*, 897 F.2d 1169, 1179-80 (1st Cir.) *cert. denied*, ___ U.S. ___, 111 S. Ct. 130 (1990). We do so also.

Next, Alex argues that Count One, which charges a RICO conspiracy, is deficient because it fails to allege that Alex personally agreed to the commission of two or more racketeering acts. In advancing this position Alex concedes, as he must, that *United States v. Neapolitan*, 791 F.2d 489 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986), specifically rejected this exact argument. Nonetheless, Alex asks us to disregard *Neapolitan*. This we decline to do. Alex's motion to dismiss Count One of the indictment is denied.

* * *

CONCLUSION

* * *

Alex's motion to dismiss Count One of the indictment is denied.

* * *

Date: Apr. 17, 1992

/s/ James H. Alesia
United States District Judge

In the United States District Court,
Northern District of Illinois

Case Number 91 CR 727

[MINUTE ORDER entered by Judge James H. Alesia on April 24, 1992]

* * *

(*This order concerns defendant 2.) The Court finds defendant Gus Alex mentally competent, within the meaning of 18 U.S.C. §§ 4241, 4247, to stand trial in this case. The hearing on competency originally set for April 27, 1992 and re-set to April 29, 1992 is stricken.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 91 CR 727
	)	
GUS ALEX, *et al.*,	)	Judge James H. Alesia
Defendants.	)	

ORDER

On April 10, 1992, the Government's motion for an order directing defendant Gus Alex to submit to physical, neurological and psychological evaluations was granted pursuant to 18 U.S.C. § 4241(a). The Government's motion was filed after one of Alex's attorneys, Carl M. Walsh, raised the issue of Alex's competency to stand trial.

Alex has submitted under seal the reports of Dr. Jack Arbit, a clinical psychologist in private practice, and Dr. Jacob H. Fox, a neurologist at Rush Alzheimer's Disease Center, a division of Rush-Presbyterian-St. Luke's Medical Center. The Government has submitted reports under seal from Dr. Howard D. Simon, a neurologist in private practice with Rovner and Simon, who is an Assistant Professor of Clinical Neurology at Northwestern University Medical School, and from Dr. Steven Rothke, a clinical psychologist at the Rehabilitation Institute of Chicago, who is a Professor of Clinical Psychiatry and Behavioral Sciences at Northwestern Medical School.

The Court has carefully reviewed *in camera* the neurological and psychological reports that were done at the behest of both Alex and the Government. Based upon its review of these reports, the Court finds that Alex is not presently suffering from a mental

disease or defect which renders him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam); *United States v. Teague*, No. 90-1706, 1992 WL 45476, at *4 (7th Cir. March 12, 1992); *United States v. Garrett*, 903 F.2d 1105, 1116 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 272 (1990). The Court finds that Alex is mentally competent, within the meaning of 18 U.S.C. §§ 4241, 4247, to stand trial in this case.

A district court is required to order a competency hearing if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceeding against him or to assist properly in his defense. 18 U.S.C. §4241(a); *Chichakly v. United States*, 926 F.2d 624, 633 (7th Cir. 1991). Based on the neurological and psychological submissions presented by the parties, the Court finds that there is no reasonable cause to believe that Alex is incompetent and that an evidentiary hearing on defendant Alex's competency is unnecessary. The hearing on competency originally set for April 27, 1992 and reset to April 29, 1992 is stricken.

SO ORDERED.

Date: Apr. 24, 1992

/s/ James H. Alesia
United States District Judge

In the United States District Court,
Northern District of Illinois

Case Number 91 CR 727

[MINUTE ORDER entered by Judge James H. Alesia on April 29, 1992]

* * *

(*This order concerns defendant 2.) Defendant Alex's motion to reconsider striking of the competency hearing and offer of proof is denied. The affidavits of counsel are in conflict with the credible medical evidence in this case. Both neurologists who examined defendant Alex, Dr. Howard Simon and Dr. Jacob H. Fox, concluded that defendant Alex was competent to stand trial. Dr. Fox who examined defendant Alex at the request of Carl Walsh, defendant Alex's attorney, found defendant Alex's neurological and cognitive performance is within normal limits without any evidence of Alzheimer's disease. Government's oral motion to quash subpoena served on the Attorney General is granted. Defendant Alex's motion is placed under seal until further order of court.

* * *

In the United States District Court,
Northern District of Illinois

Case Number 91 CR 727
[Tr. V. 17, pp. 2-3]

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JAMES H. ALESIA
April 29, 1992

* * *

MR. WALSH: We filed a motion under seal, Judge, for reconsideration of your order on competency. We have added the affidavits of counsel. I believe based on the prior record, and our affidavits, we are entitled to certainly a hearing.

THE COURT: The problem is, Mr. Walsh -- first of all, neither you nor Mr. Adam are neurologists, and both Dr. Simon, who examined Mr. Alex on behalf of the government, and also Dr. Fox, who examined Mr. Alex at your request and at your choice, found, in effect, Mr. Alex competent to stand trial. In fact, Dr. Fox's conclusion was that in his examination of Mr. Alex, Mr. Alex was completely normal from a neurological standpoint.

MR. WALSH: Yes, Judge.

THE COURT: And I also question the propriety of both you and Mr. Adam, not being neurologists, attaching affidavits; even more importantly, I mean you can't be a witness and an attorney in the case too. So it seems to me that your affidavits should be stricken.

MR. WALSH: Judge, I just suggest to you that certainly under at least one recent 7th Circuit case, the United States versus Collins, which is at 949 F.2d 921, "Statements of counsel in regard to their opinion as to the ability of the defendant to cooperate and properly

assist in the defense is most important." That is what our affidavits concern because we are the ones that know that he has not been able to assist us.

THE COURT: I will stand on my prior ruling. It seems to me when the neurologists from both sides concluded that Mr. Alex is mentally competent to stand trial; with all due deference to your opinion and Mr. Adam's opinion, I will stand on my order that he is competent to stand trial. So your motion is denied.

MR. WALSH: Thank you, Judge.

* * *

In the United States District Court,
Northern District of Illinois

Case Number 91 CR 727
[Tr. 1541-44]

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JAMES H. ALESIA
September 18, 1992

THE COURT:

* * *

As far as I'm concerned, the attorney-client privilege is one of the most important rights any client has and any client should be able to seek legal advice, tell anything, any confidential matters to his attorney, and even on occasion admit his guilt without any fear or concern that the privilege could be violated.

The privilege, as I've said repeatedly, is not that of the attorney, but it's that of the client. And only the client can waive that privilege.

In this particular matter there's been two issues raised; whether there was a specific waiver of that attorney-client privilege by Mr. Patrick, and second of all, if it was explicitly waived because there were third parties present during those attorney-client conversations, they that were not agents of the attorney and truly third parties. Mr. Mejia was not specific when he testified as to at what instance when third parties were present, true third parties in the true sense of the word, not his secretary or an investigator, and when they were not.

In my opinion if there's any doubt as to whether the attorney-client privilege should be waived, it would be resolved in upholding the attorney-client privilege.

With regard to Miss Unger, I think she was a credible witness. She testified under oath she never prepared any letters or affidavits, contrary to what Mr. Mejia said, and therefore, she does not qualify as a third party where the privilege would be waived.

With regard to Mr. Gair and Special Agent O'Rourke's testimony, they both said that on repeated instances Mr. Mejia invoked the attorney-client privilege that was the privilege that was Mr. Patrick's regarding many things.

With regard to Mr. Patrick, he testified under oath today he has a 7th grade education; he's not well-versed in legal matters; that he never, the attorney-client privilege was never explained to him by Mr. Mejia and he never mentioned, Mr. Mejia never mentioned any possibility of waiver to Mr. Patrick.

So as far as I'm concerned, while there is contradiction in the record, I think the overwhelming credible record shows that the attorney-client privilege in this matter was not specifically waived by the person to whom the privilege goes; namely, Leonard Patrick.

And therefore, I will not allow you to cross-examine Mr. Patrick or anyone else on those documents that were produced by Mr. Mejia pursuant to subpoena.

* * *

THE COURT: All right, you are entitled to make an offer of proof and I will entertain that.

With regard to sealing the record in this case, if your clients, or client, Mr. Gio or both are convicted, I think that the sealed records, the records that you subpoenaed from Mr. Mejia should also be sealed and made part of the record if there is an appeal in this case.

* * *

In the United States District Court,
Northern District of Illinois

Case Number 91 CR 727
[Tr. 1574-78]

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JAMES H. ALESIA
September 21, 1992

THE COURT:

* * *

With regard to the privileged materials and also with regard to -- to Mr. Gio's statement made to Special Agent O'Rourke, I want to elaborate on that. In reviewing these documents over the weekend and the case law over the weekend, I want to amplify what I said with regard to the attorney-client privilege.

Based upon the evidentiary hearing that was held in this case last Friday, Mr. Mejia said that he represented Mr. Patrick beginning on April 10, 1990; that he explained the attorney-client privilege to Mr. Patrick; and that there was a general waiver from Mr. Patrick of the attorney-client privilege. Mr. Patrick denied that the attorney-client privilege was explained to him. Mr. Galvan took the stand under oath and said that Mr. Patrick told him that he did not waive the attorney-client privilege.

As I previously said, it doesn't make sense to me that Mr. Patrick would give a general waiver as a member of organized crime, that anything he would tell his attorney, Mr. Mejia, could be disseminated to third parties. Certainly this was true, and Mr. Mejia should have realized that after Mr. Patrick pleaded guilty before me on April 6th, I believe, of 1992.

Also with regard to the waiver, Mr. Mejia testified that third parties were often present other than Mr. Mejia's agent, his secretary or any investigator on some occasions, although Mr. Mejia was not specific as to which occasions and did not give any dates when third parties may have been present where the privilege might have been waived. Mr. Mejia also speculated that with regard to the waiver that Emilie Unger, the common law wife of Leonard Patrick, may have assisted him in preparing documents which were submitted by Mr. Patrick to Mr. Mejia and specifically the Government Hearing Exhibit No. 1 where Mr. Mejia believed there were two different -- it was done in two different handwritings.

Under oath Mrs. Unger testified that she did not help Mr. Patrick prepare any documents that were later submitted to Mr. Mejia and also under oath denies that she ever saw Government's Hearing Exhibit No. 1 or any other document that was submitted by Mr. Patrick or Mr. Mejia, although she did testify that on occasion she might have been in the waiting room when and accompanied Mr. Patrick when he saw Mr. Mejia and on other occasion may have been in the room but she did not give any specific dates as to when she may have been in the room.

As I have said, Mr. Mejia knew as early of April 1992 that the events had changed in this case. Mr. Mejia on April 3rd, 1992 represented Mr. Patrick at a proffer meeting. And Mr. Mejia instructed Mr. Patrick at that time not to answer some questions and invoke the attorney-client privilege, which privilege, as I have repeatedly said before, is Mr. Patrick's privilege and Mr. Mejia cannot waive it without the express permission of Mr. Patrick where Mr. Patrick never -- denies that he has ever given Mr. Mejia.

Also on April 6, 1992 Patrick pled guilty to a superseding information before me. And certainly on April 6th, 1992 Mr. Mejia knew Patrick was not going to trial, that he would be the main witness against Mr. Alex, his co-defendant, and there was no reason for any tendering of any documents to co-counsel to assist in a joint defense in this case.

Mr. Gair testified in August of 1992 in conversations that he had with Mr. Mejia as late as August of 1992 Mr. Mejia raised the attorney-client privilege in conversations with him. Special Agent Jack O'Rourke also said that he was present in August of 1992 and Mr. Mejia waived the attorney-client privilege.

Now, with regard to the first subpoena which was apparently served on August 10, 1992 on Mr. Mejia from Mr. Alex's attorneys, they were characterized as being financial records which actually turned out to be bank deposit slips and checks, which was stated during the offer of proof. And I am going to get back to that. It should be noted for the record Mr. Mejia did not seek to quash the subpoena of those records, although he was still at the time claiming attorney-client privilege when he was talking to Assistant United States Attorney Gair and Special Agent Jack O'Rourke of the FBI.

Also at this time he did not seek to file a motion to quash the subpoena served on April -- or excuse me, on August 10 of 1992, even though he certainly knew full well, since he was in court on August -- excuse me, on April 6th, 1992 when Mr. Patrick pleaded guilty and he knew at that time that Mr. Patrick was going to be the main witness against the -- his co-defendant, defendant Alex, but nevertheless turned over the documents to Alex's attorneys.

Now, with regard to the second subpoena which was served a few days ago on September of 1992, the second subpoena from -- to Mr. Mejia from Mr. Alex's attorneys wherein the subpoena sought written statements that Mr. Patrick made to Mr. Mejia. Mr. Mejia again did not seek to quash the subpoena as an experienced trial lawyer might have done, but -- and he had to know at that time that those documents, if he complied with that subpoena, would certainly be used by defendant -- co-defendant Alex against his client, Mr. Patrick. But he turned over the statements notwithstanding and never filed a motion to quash raising attorney-client privilege.

And Mr. Galvan stated that he became Mr. Patrick's attorney pursuant to an order by Chief Judge Moran on, I believe, August 5th of 1992. Mr. Mejia never turned over those documents to Mr. Galvan.

So in conclusion, as far as I am concerned the credible evidence of record shows that -- and giving my observation to the unique position of having the opportunity of observing the demeanor of the witnesses, I do not believe Mr. Mejia's testimony was credible. I believe Miss Unger's, Mr. Gair and Mr. O'Rourke's testimony was credible and that there was -- and as well as Mr. Galvan and that there was never a waiver of the attorney-client privilege by Mr. Patrick and that the statements that were tendered pursuant to the subpoena of September 1992 will be made sealed and made part of the record and both the defendants Alex and Gio precluded from using them at trial.

* * *

In the United States District Court,
Northern District of Illinois

Case Number 91 CR 727

TRANSCRIPT OF PROCEEDINGS
[Tr. 2248-52]

BEFORE THE HONORABLE JAMES H. ALESIA
September 25, 1992

* * *

THE COURT: Defendant Alex's Instruction No. 12?

MR. GAIR [the prosecutor]: I object, Judge. I am tendering the Court and counsel a copy of the Seventh Circuit's decision in the United States versus Glecier. This says, as a matter of fact, the jury need not agree in a conspiracy charge, as opposed to a substantive racketeering charge on any two particular acts. In fact in Glecier no particular racketeering acts were specified in the indictment at all. The court found that this was a proper charge and that the conviction was properly entered on the RICO conspiracy count.

All that is required to be proved under Glecier is that the defendant agree that somebody would commit two racketeering acts, not two particular acts as specified anywhere.

THE COURT: Where is there a particular page that you are referring to?

MR. GAIR: Judge, one of the passages that I am citing is on page 500, beginning at the top of the page.

MR. WALSH [counsel for Alex]: Page 500 deals with the adequacy of the indictment.

MR. GAIR: I think it is rather obvious, Judge, if you don't even have to charge specific acts, which are in furtherance of the

pattern, and Glecier was a pattern of bribery, it can't be that the jury would have to agree on two specific matters. In fact that is what the case says, near the bottom of the paragraph, it says -- need be alleged or proved for a Section 1962(d) offense.

THE COURT: Where are you reading?

MR. GAIR: I'm sorry, Judge, the sentence starts out -- neither overt acts -- United States versus Torres.

MR. WALSH: That is correct, Judge. Overt acts don't have to be proved. But they do have to, but the jury has to agree on what crime the defendant agreed to commit. You can't have some part of the jury agreeing on one crime and some on another crime. You are not having a unanimous verdict.

THE COURT: Are you saying they have to agree on the two acts?

MR. WALSH: Yes.

THE COURT: Or they can agree on any two acts?

MR. WALSH: The same two acts. That is what your Instruction 12 says; otherwise you don't have a unanimous verdict. You could have a jury agreeing on two different crimes, six people saying somebody did this crime and six people saying somebody did that crime, but they don't agree on the same. That is not the law. It can't be the law.

MR. GAIR: Judge, what this case says is that the crime here is the agreement, the objective of which is to operate the enterprise in an identified pattern of racketeering activity. Here the pattern being multiple acts of bribery. The pattern in our case is multiple acts of intimidation and extortion, not the specifics, only that he agreed that someone would do more than one act of extortion or intimidation.

It is a complicated area, Judge. This is the only case that I could find in the courts of appeals on the subject. I just ask that the Court

read it before deciding, or look it over again. Because I am quite confident that I am right on the law here.

THE COURT: To do what Mr. Walsh would say, then we would have to give the jury some type of, in effect, a special verdict where you would have the different racketeering acts listed by numbers, and they would have to put a couple of Xs in there.

MR. GAIR: Racketeering acts aren't in the conspiracy count, they are incorporated by reference. We are not required to prove that any acts occurred at all. All we are required to do is to prove an agreement.

THE COURT: That's right.

MR. GAIR: An enterprise, an agreement and an effect on interstate commerce.

THE COURT: This is a difference. The fact that they made an agreement to do it, whether they did it or not --

MR. WALSH: But the point is, Judge, they have to prove that the defendant agreed to do those two acts.

THE COURT: To do two acts.

MR. WALSH: And you can't have a jury finding -- I think they have to be told. They can't be finding, some part of the jury finding let's say that Mr. Alex agreed to do two certain acts and not do some others. And another part of the jury saying, oh well, he never agreed to that. He agreed to these other ones. It is not finding the same crime.

MR. GAIR: That is actually not right at all, Judge. As you know in the 3.71 conspiracy context, we frequently charge different ways of conspiring to commit an offense against the United States, say by forging and uttering counterfeit notes, and by manufacturing counterfeit notes. The Seventh Circuit has repeatedly ruled that in that context there is no unanimity requirement on the sub-types of

violations. The point is that they agreed to commit some crime against the United States. It is the same here.

THE COURT: It seems to me all it has to do is to be an agreement to commit two acts, period. If one juror says, well, I think he agreed to this act and the other one says no, it was this act -- as long as they unanimously agree beyond a reasonable doubt, or agreed, not even committed, agreed to commit two acts, it seems to me that is enough.

MR. WALSH: Judge, I am submitting our Instruction No. 12.

THE COURT: I am going to refuse the instruction.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 91 CR 727
	)	
GUS ALEX, *et al.*,	)	Judge James H. Alesia
Defendants.	)	

STATEMENT OF REASONS FOR IMPOSING SENTENCE UNDER THE SENTENCING GUIDELINES

The Court has reviewed and considered the presentence investigation report ("PSI"), and has allowed the defendant, his counsel, and counsel for the Government to comment on its contents in accordance with Rule 32 of the Federal Rules of Criminal Procedure. For purposes of sentencing, the Court made the following findings and conclusions:

1. **BASIS OF CONVICTION**

The defendant has been adjudged guilty of the crimes of Racketeering Conspiracy and Conspiracy to Commit Extortion, in violation of 18 U.S.C §§ 1962(d) and 1951, as charged in Counts One and Four of the indictment.

2. **RONE STATEMENT**

Pursuant to *United States v. Rone*, 743 F.2d 1169 (7th Cir. 1984), this Court made all reasonable efforts to ensure that:

The defendant has had an opportunity to read the PSI, including any revisions;

The defendant and defense counsel have had an opportunity to review and discuss the PSI, including any revisions, together; and

The defendant did not wish to challenge any fact contained in the PSI.

Defendant Alex claimed to not understand the contents of the PSI when questioned at his sentencing hearing if he discussed the PSI with his attorney and understood it. However, the Court previously determined based on credible medical reports that defendant Alex was competent to stand trial.

3. SEALING OF PRESENTENCE INVESTIGATION REPORT (PSI)

The PSI has been placed under seal in the record.

The defendant and his counsel have been advised that if an appeal is taken, counsel on appeal shall be permitted access to the contents of the PSI, except for the recommendation section.

4. NEW/WITHHELD INFORMATION

No new information has been received.

5. FACTUAL STATEMENTS IN PSI

No factual disputes:

There being no objections to the factual statements contained in the PSI, the Court adopted these statements as its findings of fact.

In a letter dated October 30, 1992 from Alex's attorney, Carl Walsh, to the Probation Officer, Mr. Walsh stated that his client would make "no comment upon the matters underlying the conviction."

6. APPLICABLE GUIDELINES

Legal disputes:

a) The following legal issues were raised:

1) The first issue was whether the underlying acts of Count Four, which are the same as one of the predicate acts of Count One, should be applied with Count One.

2) The second issue was whether all eleven predicate acts alleged in the indictment should be used to determine the defendant's offense level for Count One.

3) The issue here was whether the defendant qualifies as an organizer or leader under Guideline § 3B1.1(a).

4) The fourth issue was whether the defendant could be ordered to pay restitution after he was already ordered to forfeit all proceeds of the crime.

5) The government moved for an upward departure pursuant to 18 U.S.C. § 3553(b). The government contended that the Sentencing Commission failed to take into account certain factors in formulating the 1987 Sentencing Guidelines. In his reply to this motion, the defendant requested a downward departure pursuant to Guideline § 5H1.4 due to his poor health.

b) The Court resolved the legal issues as follows:

1) Although the racketeering act of Count One and Count Four both rely on the same facts, they are separate counts of conviction. Therefore, each must be analyzed separately under the guidelines and then

grouped, if appropriate under the grouping rules in Chapter Three. *See* Guideline Section 1B1.1(d) ("If there are multiple counts of conviction, repeat steps one through three [applying the guidelines to determine the offense level] for each count of conviction. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.") Therefore, each was analyzed separately, although it did not ultimately affect the total offense level.

2) The Court determined the defendant's offense level based on seven of the eleven racketeering acts disclosed in the indictment. According to Guideline § 2E1.1(a) and the commentary thereto, the Court must "treat[ ] each underlying offense as if contained in a separate count of conviction" and then use the Guideline Sections applicable to multiple counts (Chapter Three, Section D) to determine the combined offense level. Application Note 1 to Guideline § 2E1.1 (1987).

However, to treat each underlying act as a separate count of conviction, the Court must determine that the government sufficiently proved that the defendant is culpable for each underlying act. The jury instructions given in this case did not specify that each underlying act alleged in the indictment had to be proved beyond a reasonable doubt in order to find the defendant guilty. The Government's Proffered Jury Instruction No. 38-rev.(2d) instructed that the jury need only find that "the defendant agreed that some member of the conspiracy would commit at least two acts of racketeering activity". Thus, the jury did not necessarily find the defendant guilty beyond a

reasonable doubt of conspiring to commit every racketeering act alleged in Count One. Therefore, for the Court to base the defendant's sentence on convictions for each underlying predicate act, it must be satisfied that the Government has proven that the defendant is responsible for each underlying act beyond a reasonable doubt. *See* Guideline § 1B1.2(d) and Application Note 5 thereto of the Sentencing Guidelines effective November 1, 1989 (treat each underlying offense as a separate count of conviction only "if the Court, were it sitting as a trier of fact, would convict the defendant of conspiracy to commit that object offense.")

After observing all the evidence and reviewing the case, the Court found that it would have convicted the defendant of conspiracy to commit the seven underlying acts of racketeering alleged in Count One listed below. At trial, credible evidence showed that defendant Alex conspired to commit each of these racketeering acts. As such, in determining the offense level for Count One, we applied the guideline sections as if the defendant was convicted of conspiring to commit each of these seven underlying offenses.

3) The defendant qualifies as an organizer or leader under §3B1.1(a). The defendant argued that none of the criteria listed in the commentary to that section apply to him. We disagreed. Application Note 3 to § 3B1.1 sets out the factors to be used: the exercise of decision-making authority, the nature of the participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the

offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. In addition, the Commentary notes, "there can, of course, be more than one person who qualifies as a leader or organizer...."

The defendant argued that the evidence shows that Leonard Patrick was the leader and organizer and that he was just a participant. He ignores the statement above, however, that there can be multiple organizers or leaders. He also ignores the evidence showing that he exercised decision-making authority over most of the offenses. He also understates his degree of participation in the fruits of the crime and the nature and scope of the crime. These are all factors to be considered in the determination. The defendant unquestionably meets the criteria for organizer or leader under § 3B1.1(a).

4) The Court found that restitution can be ordered in addition to the forfeiture judgment. Pursuant to Guideline § 5E4.1(a), "[r]estitution shall be ordered for convictions under Title 18 of the United States Code...." Furthermore, 18 U.S.C. § 3663(a)(1) states that "[t]he court, when sentencing a defendant convicted of an offense under this title ... may order, in addition to ... any other penalty authorized by law, that the defendant make restitution to any victim of such offense." Indeed, Alex cited no authority to the contrary. Thus, nothing prevented this Court from ordering restitution in addition to the forfeiture judgment.

5) The Court agreed with the government that a two-level upward departure is warranted because the defendant was involved in organized crime and because the conspiracy involved threats to family

members as opposed to threats just to the victims themselves. *See United States v. Schweihs*, 971 F.2d 1302 (7th Cir. 1992). The Court denied the defendant's request for a downward departure based on his poor health.

c) After resolving these issues, the Court determined that the applicable guidelines were:

The Court applied the Sentencing Guidelines effective October, 1987 because they were in effect at the time of the commission of the crimes and are less onerous to the defendant than application of the Sentencing Guidelines effective November 1, 1992 in effect on the date of sentencing. *Miller v. Florida*, 482 U.S. 423, 435 (1987).

Count One: Racketeering Conspiracy – 18 U.S.C. § 1962(d)

Guideline § 2E1.1, applicable to this Count, sets the base offense level at 19, or at the offense level for each underlying racketeering act after being grouped, whichever is greater. Here, the offense level for the group of racketeering acts is greater.

Racketeering Act One: Francesco's Hole in the Wall Restaurant

Base Offense Level:	18	[§ 2E1.1(a)(2) refers to § 2B3.2(a) which sets the base offense level at 18.]
Specific Offense Characteristics:	+3	[§ 2B3.2(b)(1) requires an increase of the amount specified in § 2B3.1(b)(1) if the amount extorted or demanded exceeds $2,500. Here, the amount demanded was

		$200,000, so the appropriate increase is 3 levels.]
Subtotal:	21	
Offense Level Adjustments:	+4	[§ 3B1.1(a) requires a 4-level increase if defendant was an organizer and/or leader of a criminal activity that involved 5 or more participants. Here, only 4 participants were indicted together but evidence at trial proved that many others were involved. Credible testimony showed that Gary Edwards, Ray Spencer and others, including James LaValley who testified at trial, were all a part of the defendant's organization. Therefore, a 4-level increase is required.]
Adjusted Offense Level:	25	

Racketeering Act Two: Myron and Phil's Restaurant

Base Offense Level:	18	[§ 2E1.1(a)(2) refers to § 2B3.2(a) which sets the base offense level at 18.]
Specific Offense Characteristics:	+3	[3-level increase pursuant to § 2B3.2(b)(1) and § 2B3.1(b)(1) because $154,000 was demanded.]

Subtotal:	21	
Offense Level Adjustments:	+4	[As noted above, a 4-level increase is required because the defendant was a leader or organizer within the meaning of § 3B1.1(a).]
Adjusted Offense Level:	25	

Racketeering Act Three: Billy and Company Restaurant

Base Offense Level:	18	[§ 2E1.1(a)(2) refers to § 2B3.2(a) which sets the base offense level at 18.]
Specific Offense Characteristics:	+3	[3-level increase pursuant to § 2B3.2(b)(1) and § 2B3.1(b)(1) because $72,000 was extorted.]
	+2	[§ 2B3.2(b)(3)(A) requires a 2-level increase if bodily injury resulted from defendant's actions. Here, the victim was struck in the face and bled from the mouth.]
Subtotal:	23	
Offense Level Adjustments:	+4	[As noted above, a 4-level increase is required because the defendant was a leader or organizer within the meaning of § 3B1.1(a).]
Adjusted Offense Level:	27	

Racketeering Act Four: Father and Son Pizza

Base Offense Level:	18	[§ 2E1.1(a)(2) refers to § 2B3.2(a) which sets the base offense level at 18.]
Specific Offense Characteristics:	+4	[4-level increase pursuant to § 2B3.2(b)(1) and § 2B3.1(b)(1) because the amount demanded was $300,000.]
Subtotal:	22	
Offense Level Adjustments:	+4	[As noted above, a 4-level increase is required because the defendant was a leader or organizer within the meaning of § 3B1.1(a).]
Adjusted Offense Level:	26	

Racketeering Act Five: King Nissan Car Dealership

Base Offense Level:	18	[§ 2E1.1(a)(2) refers to § 2B3.2(a) which sets the base offense level at 18.]
Specific Offense Characteristics:	+4	[4-level increase pursuant to § 2B3.2(b)(1) and § 2B3.1(b)(1) because the amount demanded was $300,000 (even though only $150,000 was collected).]
Subtotal:	22	

Offense Level Adjustments:	+4	[As noted above, a 4-level increase is required because the defendant was a leader or organizer within the meaning of § 3B1.1(a).]
Adjusted Offense Level:	26	

Racketeering Act Six: Scott Brooks

Base Offense Level:	18	[§ 2E1.1(a)(2) refers to § 2B3.2(a) which sets the base offense level at 18.]
Specific Offense Characteristics:	+2	[2-level increase pursuant to § 2B3.2(b)(1) and § 2B3.1(b)(1)(C) because $20,000 was extorted.]
	+2	[§ 2B3.2(b)(3)(B) requires a 2-level increase because the victim suffered bodily injury.]
Subtotal:	22	
Offense Level Adjustments:	+4	[§ 3B1.1(a) requires a 4-level enhancement because the defendant was an organizer or leader.]
Adjusted Offense Level:	26	

Racketeering Act Seven: Barry Friedman

Base Offense Level:	18	[§ 2E1.1(a)(2) refers to § 2B3.2(a) which sets the base offense level at 18.]
Offense Level Adjustments:	+4	[§ 3B1.1(a) requires a 4-level enhancement because the defendant was an organizer or leader.]
Adjusted Offense Level:	22	

Combining the Multiple Underlying Offenses:

Pursuant to § 2E1.1, the total offense level for Count One must be determined by applying the grouping rules of Chapter Three, Section D to the individual underlying offenses set out above. Pursuant to § 3D1.2, none of the individual acts was grouped because each involved separate victims. As such, each act was treated as a separate group to apply the guideline to determine the combined offense level.

	Level	Units Assigned
Highest Offense Level:	27	1 [§ 3D1.4(a)]
Additional Offense Levels (in descending order):	26	1 [§ 3D1.4(a)]
	26	1 [§ 3D1.4(a)]
	26	1 [§ 3D1.4(a)]

	25	1 [§ 3D1.4(a)]
	25	1 [§ 3D1.4(a)]
	22	½ [§ 3D1.4(b)]
Total Units:		6½
Increase in Greatest Offense Level:	5	[§ 3D1.4 requires an offense level increase of 5 levels if the number of units assigned is greater than 5.]
Total, Combined Offense Level for Count One:	32	

Count Four: Conspiracy to Commit Extortion – 18 U.S.C. § 1951:

Base Offense Level:	18	[§ 2B3.2(a)]
Specific Offense Characteristics:	+3	[§ 2B3.2(b)(1) refers to the table in § 2B3.1 to determine the appropriate increase. Here, a 3-level increase is required because $154,000 was extorted from the victim.]
Subtotal:	21	
Offense Level Adjustments:	+2	[§ 3B1.1(c) requires a 2-level increase because the defendant was an organizer or leader.]
Adjusted Offense Level:	23	

Multiple Counts:

Pursuant to Guideline § 3D1.1, Counts One and Four were grouped according to the grouping rules of § 3D1.2. According to § 3D1.2(c), Counts One and Four were grouped into one group because the acts underlying Count Four are treated as a specific offense characteristic in Count One and, thus, involve substantially the same harm. As such, according to Guideline § 3D1.3(a), the offense level applicable to this group is the "highest level of the Counts in the Group." Here, the highest offense level is that pertaining to Count One, which is 32. Furthermore, because there is only one group, no increase was warranted. *See* Guidelines § 3D1.4.

Combined, Adjusted
Offense Level: 32

Departures:

Pursuant to the Government's Motion for an Upward Departure, the Court found that a two-level increase was warranted. The Court found that a two-level increase was appropriate for the threats made to family members of the victims of the extortions and for the defendant's participation in organized crime. *See United States v. Schweihs,* 971 F2.d 1302 (7th Cir. 1992). As such, the defendant's final, adjusted offense level after departure is 34. The Court denied defendant Alex's motion for a downward departure.

Criminal History Category: I

151 to 188 months imprisonment

2 to 3 years supervised release

$17,500 to $752,000 fine (plus cost of imprisonment ($1,492 per month) and supervision ($1,318 per year))

$376,000 restitution

$197,000 forfeiture based on the jury verdict

$100.00 special assessment

7. **SENTENCE**

a) On Count One, which is governed by the sentencing guidelines, the Court sentenced the defendant to 188 months in the custody of the Bureau of Prisons to be followed by three years of supervised release and fined the defendant $250,000 payable immediately.

Pursuant to Title 18 U.S.C. § 3013, the Court also levied a $50.00 special assessment on Count One.

b) On Count Four, which is also governed by the sentencing guidelines, the Court sentenced the defendant to 188 months in the custody of the Bureau of Prisons to be followed by three years of supervised release.

This sentence is to run concurrently with the sentence imposed on Count One.

Pursuant to Title 18 U.S.C. § 3013, the Court also levied a $50.00 special assessment on Count Four.

The Court ordered the defendant to forfeit to the United States $197,000 pursuant to the judgment entered on the jury verdict in this case. The Court ordered the defendant to pay restitution, jointly and severally with Nicholas Gio, in the amount of $376,000 to the victims of these crimes which were legitimate businesses or legitimate business owners, payable immediately.

In sum, the Court ordered the defendant to pay a total of $823,000 in addition to the $100.00 special assessment. $197,000 has already been paid into, and is currently held by, the Clerk of the Court to satisfy the forfeiture judgment. An additional $25,000 has also been paid to the Clerk of the Court by this defendant. This amount will be deducted from

the amount of restitution ordered. Therefore, the Court determined that the defendant owed $351,000 of restitution and a fine of $250,000 for a total of $601,000.

All amounts paid by the defendant pursuant to this sentence are to be applied first to satisfy the restitution order and then to pay the fine, pursuant to Guideline Section 5E4.1(b).

Defendant Alex was ordered to pay all costs of imprisonment and supervised release to be paid from the $250,000 fine imposed.

The Court's order freezing the defendant's assets will be lifted as soon as the defendant pays an additional $601,000 plus the $100.00 special assessment into the Clerk of the Court.

8. **REASONS FOR SENTENCE**

The Court received several letters of recommendation on behalf of the defendant, some dating back to the 1960's, which the Court took into consideration.

The Court found that the following aggravating circumstances existed that were of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that these circumstances should result in a sentence different from that described by the guidelines:

> The Court found that a two-level increase was appropriate because the 1987 Sentencing Commission failed to adequately take into consideration the harm resulting from threats directed at the family members of the victims of the extortions and for the defendant's participation in, and utilization of, organized crime. *See United States v. Schweihs*, 971 F.2d 1302 (7th Cir. 1992).

The guideline range exceeded 24 months, and the Court selected this particular sentence for the following reasons:

> The Court imposed the maximum sentence because the defendant has been shown to be a leader and long time member of organized crime in Chicago. The defendant profited from extortion and other illegal activities which involved not only violence and threats of violence against innocent, hardworking people, but also against the families of those victims.

Fine:

> A fine of $250,000 was imposed because, although the maximum of $752,000 was available, to avoid any potential problems of double counting, the Court imposed the maximum fine allowed not including fines allowed based on the amount of gain or loss. In this case, forfeiture of $197,000 was ordered because this is the amount by which the jury found the defendant profited. Furthermore, restitution was ordered for the full amount of loss incurred by all legitimate victims. As such, the Court was concerned that a fine based on the amount of gain to the defendant or loss to the victims could be considered double counting. Therefore, the maximum fine allowed under 18 U.S.C. § 3571(b), other than those based on gain or loss, was imposed. However, even if double-counting is not an issue, the Court considers forfeiture, restitution, and fine totaling $823,000 to be adequate for these offenses.

9. **RIGHT TO APPEAL**

> The Court has advised the defendant of his right to appeal under FED. R. APP. P. 4(b), including his right to seek leave to appeal *in forma pauperis*.

10. VOLUNTARY SURRENDER/DETENTION

Detention Pending Appeal: Under 18 U.S.C. § 3143(b), the Court ordered that the defendant be detained pending appeal because it found:

a) By clear and convincing evidence that the defendant was likely to flee or pose a danger to the safety of other persons or the community if released; and

b) That the appeal was merely for purposes of delay and did not raise a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that did not include a term of imprisonment.

/s/ James H. Alesia
United States District Judge

Dated *nunc pro tunc*:
Feb. 19, 1993

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 7, 1994

Before
Hon. RICHARD A. POSNER, Chief Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. JOHN W. REYNOLDS, District Judge*

UNITED STATES of America,	)	Appeal from the
	)	United States
Plaintiff-Appellee,	)	District Court for
	)	the Northern
No. 93-1585 v.	)	District of Illinois,
	)	Eastern Division.
	)	
Gus ALEX,	)	No. 91 CR 727
	)	Hon. James H. Alesia
Defendant-Appellant.	)	

ORDER

On October 3, 1994, defendant-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and

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* Hon. John W. Reynolds, of the Eastern District of Wisconsin, sitting by designation.

none of the active judges** has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

** Hon. Ilana Diamond Rovner took no part in the consideration of the suggestion for rehearing en banc.

AFFIDAVIT OF CARL WALSH

CARL WALSH, being first duly sworn under oath, deposes and states as follows:

1. For the past twenty six years I have practiced law. I spent the first two years of my legal career as an assistant state's attorney in Cook County. The remaining years of my practice have been devoted to a private practice, primarily consisting of criminal defense work.

2. I am one of the attorneys of record for Gus Alex. I have known Gus Alex since the late 1960s when I started my private practice. In the late 1970s, I got to know Alex better and began representing him and his business. Since that time, I have had lunch with Alex at least weekly when Alex was in town. I represented Alex in 1980 when he sold his business. Since Alex's indictment in December, 1991, I have visited with him often (at his home, over a meal or at my office.)

3. Over the past eight years, I have observed a gradual deterioration in Alex's physical and mental well-being. Alex's walk became a shuffle (he used to walk vigorously). Alex would speak of events that happened fifty years ago, but would not recall events of a day or two ago. Lately, at lunch, he has been unable to read the menu or the bill.

4. As an officer of the Court, I state that it is my firm belief that Alex cannot assist and cooperate in the preparation of a defense and does not understand the nature and cause of the charges against him. I do not make this statement lightly; this is the first time I have ever attested to the incompetence of a client. I believe Alex's mental incompetence is real. I do not at all believe that he is malingering. The symptoms detailed in this affidavit arose prior to his indictment.

5. As a general matter, Alex has no concentration. He cannot fixate on his surroundings. Alex cannot read any document because noise distracts him. He is unable to read various materials generated

in reference to this case. Alex has been unable to assist counsel in preparing a defense. He lacks memory. He is unable to decipher chronology.

6. When Alex was detained without bond I visited him. Authorities had placed him in segregation. At that time, Alex was delusional. For instance, he said that he had spoken with dead members of his family. He spoke of being present at a massacre at a Greek airport.

7. After Alex was released on bond, it took about eight weeks for me to convince him that the case was still pending. Alex had believed that the case was over because he had been released from custody. In spite of my telling him that a case was still pending he would repeatedly state that he was happy to be discharged.

8. Alex is unable to understand the nature of the charges. He has no concept of time. He cannot understand that the indictment relates back in time. He cannot understand how he can be charged with dealing with somebody who he has not seen for years. Alex cannot understand the concept that a person can be indicted for events that allegedly transpired years ago.

9. Alex cannot give counsel a response to the allegations in the indictment because he has no memory of the alleged events. Counsel has been unable to debrief Alex regarding the allegations in the indictment. Alex cannot give me any background regarding his alleged relationships with others at issue in this case.

10. The government's main witness at trial will be Leonard Patrick. Thus, it is very important for counsel to learn the nature of Alex's relationship with Patrick. However, Alex cannot tell me when he met Leonard Patrick. He cannot tell me how long ago he met Patrick. When asked if there was a period of time when he did not see Patrick, Alex says quite a number of years, but cannot even give the particular decade when he did not see him. Alex cannot remember the last time he spoke to Patrick, or estimate the number of years since his last conversation with Patrick.

11. One the most important pieces of evidence will be the December, 1989 tape recording between Alex and Patrick. Again, it is important for counsel to understand Alex's response to this evidence. With respect to this alleged conversation reflected on the tape and transcript, Alex has no recall. He cannot remember the alleged meeting with Patrick. He cannot remember the alleged conversation as reflected on the tape and corresponding transcript. Alex insists that Patrick could not have said what he allegedly said on the tape. He says that he could not have been present for the alleged meeting.

12. Upon receiving doctors' reports regarding his competency, I read them to Alex. On two occasions thereafter, Alex asked me whether we had received the doctors' reports.

13. Alex's lack of mental competency is not only exhibited in his dealings with counsel. His wife, who I have known for a number of years, reports the same. Mrs. Alex relates of a recent incident when Alex woke up and could not recognize her. Alex kept asking her to get his wife. It took Alex a couple of hours to recognize Mrs. Alex as his wife. Mrs. Alex also relates that Gus Alex cannot concentrate. Alex repeatedly denies that Mrs. Alex told him things, although Mrs. Alex has done so repeatedly.

14. There is no way that Alex is going to be able to be aware of the happenings at trial, let alone understand and confront them. Alex would be unable to assist counsel at trial since he would be unable to endure sitting through a whole day of trial testimony and understand the testimony of witnesses.

15. Alex is unable to make a knowing and intelligent decision regarding the exercise of his constitutional right to testify or remain silent in his defense. In my opinion, there is no way Alex could

testify. Aside from answering preliminary questions, Alex would not be competent to answer questions with any understanding.

FURTHER THE AFFIANT SAYETH NOT

/s/ Carl Walsh

Signed and subscribed before me
this 27th day of April, 1992.

/s/ Carolyn Craven
NOTARY PUBLIC

AFFIDAVIT OF SAM ADAM

SAM ADAM, having been first duly sworn, deposes and states as follows:

1. I am a lawyer. I was licensed by the Illinois Supreme Court on August 3, 1961. I am a member of the United States District Court for the Northern District of Illinois, the Seventh Circuit Court of Appeals, the Supreme Court of the United States.

2. I have tried only one civil case in my professional career, but instead have devoted my entire professional life to the criminal law. In that regard, I have never been a prosecutor, public defender, or judge, but always and solely a private defense lawyer on behalf of persons charged with violations of the criminal law.

3. I don't know how many criminal defendants I have interviewed, nor how many I have represented in various courts in more than 30 years of practice. But the number is certainly in excess of many thousands. Similarly, I don't know how many trials in which I participated, but this number, too, must also number several thousands.

4. In my experience, I have found that nothing is more important to the defense of the criminally charged than an understanding of the facts by the defense lawyer. Of necessity, this understanding must come in large measure to the defense lawyer from the client himself. The whole thrust of the attorney-client privilege is predicated upon the proposition that the client must be truthful and candid with the defense lawyer. Without an unencumbered line of communication between client and lawyer, the lawyer himself becomes a bumbling, fumbling incompetent representative of the client's interest's.

5. I have spoken with Gus Alex on three occasions. In the first conversation, perhaps about April 15, 1992, in Attorney Walsh's office. The conversation was more or less general in nature and was really best described, perhaps, as introductory. The second and third

conversations occurred on April 22, 1992, and April 23, 1992. These latter conversations took place at Gus Alex's home. The setting was quiet, uninterrupted, and pleasant. Mr. Alex appeared very relaxed and expressed a complete willingness to cooperate in his defense in every way. However, he was simply not able to do so. I read portions of his indictment to him. He said he understood those portions, but when I asked him to tell me what he was charged with he was unable to do it. He said he knew Lennie Patrick, but when I asked him where he met Patrick, when, the circumstances etc., Mr. Alex said he did not know.

Mr. Alex said he had no recollection of meeting Patrick at a hospital (a major portion of the Government's proof) nor did he express any memory of any conversation between Patrick and himself. Sporadically throughout the conversation, Mr. Alex would relate short stories and the names of persons, places and incidents which could not possibly have any relevance at all to the forthcoming trial. The most recent of these revelations occurred in perhaps 1961 or 1962.

6. I found Mr. Alex to be a thoroughly charming and pleasant man who refuses to use even a mild profanity in the presence of his wife, but a man who is almost totally out of touch with the reality of his present dilemma other than the general idea that soon he will be on trial on charges which he does not and cannot understand. Mr. Alex is totally incapable of assisting Mr. Walsh and me in his defense, and it is obvious to me that this is not purposeful on his part. I ask him a question, he closes his eyes, there is a long pause, and then: "I don't know"; or "I don't remember"; or, more likely than not, the "answer" constitutes a non sequitur.

7. I did not recall ever representing anyone so grossly incapable of assisting in his defense as Mr. Alex is. I have never previously filed my affidavit alleging client incompetency in any other case. In all my professional experience, delineated above, I have never faced the prospect of proceeding to trial representing a client so divorced from the realities of his present dilemma. I have never

previously faced the prospect of a trial in which a defendant represented by me is so completely incapable of assisting me in the preparation of his defense. Particularly relevant here is that I cannot possibly prepare Mr. Alex to testify in his own defense. Beyond the few introductory questions to which Mr. Alex will appropriately respond (name, address, family, etc.) Mr. Alex is incapable of a relevant response to questions put to him concerning the charges in the indictment. It is simply impossible to prepare Mr. Alex to testify in his own behalf in a credible fashion. Mr. Alex is not capable of either assisting his counsels, testifying in his own behalf, or otherwise presenting a defense.

8. I honestly feel that I would be derelict and remiss in my obligations to this court, and to this defendant if I did not make the above facts known to this Honorable Court so that this court may be fully apprised prior to any rulings and decisions which this Court hereafter renders.

FURTHER THE AFFIANT SAYETH NOT

/s/ Sam Adam

Subscribed and Sworn to before me
this 27th day of April, 1992.

/s/ Carol L. Purchase
NOTARY PUBLIC

Supreme Court, U.S.
FILED
MAY 8 1995
OFFICE OF THE CLERK

No. 94-1334

In the Supreme Court of the United States

OCTOBER TERM, 1994

GUS ALEX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the district court erred in declining to instruct the jury that it must unanimously agree on which two or more predicate racketeering acts constitute the "pattern of racketeering activity" required for a RICO conspiracy conviction.

2. Whether a RICO conspiracy charge requires proof that the defendant agreed to "personally commit" at least two predicate racketeering acts.

3. Whether the district court erred in prohibiting cross-examination of a government witness about documents obtained from the witness's former attorney.

4. Whether the district court properly departed upward from the guideline range in sentencing petitioner under the Sentencing Guidelines.

5. Whether the district court erred in declining to hold a hearing to determine petitioner's competency to stand trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1334

GUS ALEX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 32 F.3d 1203. The order of the district court finding petitioner competent to stand trial (Pet. App. 16a-17a) is reported at 789 F. Supp. 953.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1994. A petition for rehearing was denied on November 7, 1994. Pet. App. 49a-50a. The petition for a writ of certiorari was filed on February 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiracy to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); and conspiracy to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to 188 months' imprisonment, to be followed by three years of supervised release, and fined $250,000. In addition, petitioner was ordered to forfeit $197,000 and to pay, jointly and severally with co-defendant Nicholas Gio, $376,000 in restitution. Pet. App. 45a-46a.

1. The evidence at trial showed that the "Patrick Street Crew" operated a protection racket in Chicago, Illinois, for the organized crime syndicate known as the "Outfit" between 1983 and 1989. During that period, members of the Patrick Street Crew threatened the owners of small businesses and other individuals with destruction of their property, as well as death and injury to themselves and their families, if they did not make substantial cash payments to the crew. The crew was headed by Leonard "Lenny" Patrick, who dealt directly with some of the victims of the extortion schemes and directed the activities of the crew with respect to the other schemes. Co-defendants Mario Rainone and Nicholas Gio were members of the crew. Pet. App. 1a-2a; Gov't C.A. Br. 3-13.[1]

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[1] Although the government's brief was filed under seal in the court of appeals, a redacted version was publicly filed. Unless otherwise noted, "Gov't C.A. Br." refers to the redacted version of the brief.

Petitioner was Patrick's superior in the Outfit. Patrick was required to obtain petitioner's approval for the crew's extortion activities and to share the profits with petitioner. Petitioner supervised the crew's activities and collected his share of the profits during meetings with Patrick; his position in the crew's hierarchy insulated him from contact with the crew's victims and street-level enforcers. Petitioner's superior was Sam Carlisi, the head of the Outfit. Pet. App. 2a-3a; Gov't C.A. Br. 4-5, 13-20.

2. Petitioner filed a pretrial motion to dismiss the RICO conspiracy count on the ground that it failed to allege that he agreed personally to commit at least two predicate acts of racketeering. Relying on *United States* v. *Neapolitan*, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986), the district court denied the motion. Pet. App. 13a-14a.

3. Before trial, one of petitioner's counsel informed the district court that he doubted that petitioner was mentally competent to stand trial. On the government's motion pursuant to 18 U.S.C. 4241(a), the court ordered petitioner to submit to physical, neurological, and psychological evaluations to determine his competency to stand trial. Pet. App. 16a.

After being examined, petitioner submitted medical reports from Dr. Jack Arbit, a clinical psychologist, and Dr. Jacob Fox, a neurologist. Neither report addressed the standard of competency under 18 U.S.C. 4241(d), but Dr. Fox reported that the results of petitioner's cognitive and neurological tests were within normal limits. Pet. App. 7a, 16a; Gov't C.A. Br. 39-41. The government submitted reports from Dr. Howard D. Simon, a neurologist, and Dr. Steven Rothke, a clinical psychologist. The two doctors noted

that petitioner had signs of early senile dementia, but they both concluded that petitioner was capable of understanding the nature and consequences of the proceedings against him and of assisting in his defense. Pet. App. 7a, 16a; Gov't C.A. Br. 41.

After "carefully review[ing]" the reports, the district court found that petitioner was "not presently suffering from a mental disease or defect which renders him mentally incompetent" and that petitioner was "mentally competent, within the meaning of [the statute], to stand trial." Pet. App. 16a-17a. Because there was "no reasonable cause to believe" that petitioner was incompetent based on the medical reports, the court concluded that an evidentiary hearing was unnecessary. *Id.* at 17a.

Petitioner filed a motion for reconsideration. In support of the motion, both defense counsel filed affidavits stating their belief that petitioner could not competently assist in the preparation of his defense. Pet. App. 51a-57a. At a hearing, the district court "question[ed] the propriety of [defense counsel], not being neurologists, attaching affidavits." *Id.* at 19a. The court also believed that the affidavits should be stricken because defense counsel could not "be a witness and an attorney in the case too." *Ibid.* Since "the neurologists from both sides concluded that [petitioner] [was] mentally competent to stand trial," the court denied the motion for reconsideration. *Id.* at 20a. In its written minute order, the court further explained that it had denied the motion because "[t]he affidavits of counsel are in conflict with the credible medical evidence in this case." *Id.* at 18a.

4. Leonard "Lenny" Patrick, the head of the Patrick Street Crew, testified as a government witness at trial pursuant to a plea agreement. During cross-examination, defense counsel sought to impeach Patrick's credibility with documents that had been obtained by subpoena from David Mejia, Patrick's former counsel who had represented Patrick through his guilty plea. The government objected on the ground that the documents were protected by Patrick's attorney-client privilege. Following an evidentiary hearing, the district court concluded that Patrick had not waived his attorney-client privilege with respect to the documents. Pet. App. 21a-26a. The court accordingly refused to allow petitioner "to cross-examine Mr. Patrick or anyone else on those documents that were produced by Mr. Mejia pursuant to subpoena." *Id.* at 22a. The court ordered that the records be sealed and made part of the record for purposes of an appeal. *Id.* at 22a, 26a.[2]

5. Count 1 of the indictment charged petitioner, Patrick, and co-defendants Mario Rainone and Nicholas Gio with a RICO conspiracy, and Count 2 charged Patrick, Rainone, and Gio with a substantive RICO violation. C.A. App. 54-76. Count 2 of the indictment alleged 11 predicate acts of racketeering ac-

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[2] Although defense counsel apparently reviewed the documents after receiving them from Mejia, the government did not have access to the documents, with the exception of one document consisting of handwritten notes by Patrick that was marked as an exhibit during the evidentiary hearing. On appeal, the court of appeals permitted counsel for both sides to review the sealed record of the evidentiary hearing and petitioner's offer of proof, but prohibited them from reviewing the documents themselves. Gov't C.A. Br. (Under Seal) 23 n.15.

tivity that constituted the "pattern of racketeering activity." *Id.* at 68-76. Count 1 alleged that the "pattern of racketeering activity" for the RICO conspiracy "consist[ed] of the eleven acts of racketeering set forth in Count Two of this indictment, which are realleged and incorporated by reference herein." *Id.* at 56.

At trial, petitioner submitted a proposed instruction requiring the jury unanimously to agree on "at least two specific racketeering acts that all of you believe the defendant agreed that some member of the alleged conspiracy would commit" in order to convict petitioner of the RICO conspiracy. C.A. App. 198. The district court refused to give the instruction. Pet. App. 27a-30a. Instead, the court instructed the jury that, in order to find petitioner guilty of the RICO conspiracy, it was required to find that petitioner "agreed that some member of the conspiracy would commit at least two acts of racketeering activity." *Id.* at 34a. The jury returned a general verdict finding petitioner guilty of the RICO conspiracy charged in the indictment. C.A. App. 205.

6. At sentencing, the district court determined that petitioner's offense level under the Sentencing Guidelines was 32 for the RICO conspiracy charged in Count 1. Pet. App. 33a-34a.[3] The court noted that Guidelines § 2E1.1(a) directed it to treat each of the predicate racketeering acts as a separate count of conviction and to group them to determine a com-

[3] The district court "applied the Sentencing Guidelines effective October, 1987 because they were in effect at the time of the commission of the crimes and [were] less onerous to [petitioner] than application of the Sentencing Guidelines effective November 1, 1992 in effect on the date of sentencing." Pet. App. 37a.

bined offense level. Because the jury instructions had not required the jury to find that petitioner conspired to commit every predicate racketeering act in order to convict him of the RICO conspiracy, the court concluded that it "must be satisfied that the Government has proven that [petitioner] is responsible for each underlying act beyond a reasonable doubt" in order to treat it as a separate count of conviction for purposes of the Sentencing Guidelines. *Id.* at 34a-35a. The court "found that it would have convicted [petitioner] of conspiracy to commit * * * seven underlying acts of racketeering" because "credible evidence showed that [petitioner] conspired to commit each of these racketeering acts." *Id.* at 35a. It therefore determined petitioner's offense level for the RICO conspiracy based on only seven of the 11 predicate acts of racketeering activity charged in the indictment. *Id.* at 37a-43a.

The district court also granted the government's motion for an upward departure. Pet. App. 44a. It found that "a two-level increase [in the offense level] was appropriate for the threats made to family members of the victims of the extortions and for [petitioner's] participation in organized crime." *Ibid.* With an offense level of 34 and a criminal history category of I, petitioner's Guidelines range was 151-188 months' imprisonment. *Ibid.*[4] The court sen-

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[4] The district court determined that petitioner's offense level for the Hobbs Act conspiracy was 23. Pet. App. 43a. After applying the grouping rules of Sections 3D1.1 and 3D1.2 to the two counts of conviction, the court applied the highest offense level of the counts in the group (*i.e.*, 32) to the

tenced petitioner to 188 months in prison. *Id.* at 45a.

7. The court of appeals affirmed. Pet. App. 1a-10a. It rejected petitioner's claim that he was deprived of his Sixth Amendment right of confrontation when the district court refused to allow him to cross-examine Patrick with the documents subpoenaed from Patrick's former counsel. *Id.* at 3a-6a. The court found that the district court did not abuse its discretion in ruling that the documents were protected by the attorney-client privilege, because "[e]vidence that the district judge was entitled to credit and did credit established that the notes had been prepared by Patrick at the direction and for the use of his then lawyer, Mejia, that they were in Patrick's case file in Mejia's office when subpoenaed, and that they give Patrick's version of the acts of which the indictment accused him." *Id.* at 4a. After observing that Patrick's credibility had already been impeached during three days of cross-examination, the court found that "[t]he notes [Patrick] had written to Mejia would have added too little to the picture to warrant abrogating the attorney-client privilege." *Id.* at 5a.

The court of appeals likewise rejected petitioner's claim that the district court erred in refusing to hold an evidentiary hearing under 18 U.S.C. 4241 to determine whether he was competent to stand trial. Pet. App. 7a. In light of the expert reports that

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grouped counts pursuant to Guidelines § 3D1.3(a). Pet. App. 44a.

With an offense level of 32 and a criminal history category of I, petitioner's Guidelines range would have been 121-151 months' imprisonment.

had been submitted to the district court, the court of appeals concluded that the district court did not clearly err in finding that there was no "reasonable cause" under Section 4241(a) to believe that petitioner was incompetent to stand trial. Pet. App. 7a.

Finally, the court of appeals upheld the district court's upward departure under the Sentencing Guidelines. Pet. App. 8a-10a. After noting that the 1987 version of the guideline for extortion offenses that was applied by the district court did not provide an adjustment for threats of bodily injury or death, the court concluded that the threats against family members of the victims of the extortion schemes were a proper basis for an upward departure. *Id.* at 8a. The court also held that petitioner's participation in "organized crime" provided a permissible basis for the upward departure. *Id.* at 9a-10a. The court explained that the RICO guidelines were not conceived with sophisticated and long-lasting criminal groups such as petitioner's in mind, and that "[h]ad the guideline range for RICO offenses been set with the Chicago Outfit in mind, it would have greatly overpunished the run of the mill criminal activities that are the routine grist of RICO prosecutions." *Id.* at 9a.[5]

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[5] The court of appeals found that "[t]he other issues relating to guilt are either resolved by decisions of this court that we are not disposed to reexamine or have no possible merit." Pet. App. 8a.

ARGUMENT

1. Petitioner contends (Pet. 12-14) that the jury should have been instructed that it was required unanimously to agree on the two or more predicate racketeering acts constituting the "pattern of racketeering activity" in order to find petitioner guilty of RICO conspiracy. In a related vein, petitioner contends (Pet. 14-16) that he is entitled to reversal of his RICO conspiracy conviction because the jury may have relied on one of the four predicate acts for which the district court found insufficient evidence at sentencing. Neither contention warrants this Court's review.

a. RICO makes it unlawful for any person to conspire to conduct the affairs of an enterprise through a pattern of racketeering activity. See 18 U.S.C. 1962(c) and (d). The statute defines "racketeering activity" to mean "any act or threat involving" specified state crimes, any "act" indictable under specified federal statutes, and certain federal offenses. 18 U.S.C. 1961(1). It further defines "pattern of racketeering activity" to require "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. 1961(5). In order to constitute a "pattern of racketeering activity," the predicate racketeering acts must be related, and amount to or pose a threat of continued criminal activity. *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). Thus, RICO requires the jury to find that each predicate racketeering act has a certain characteristic, *i.e.*, that it is part of a "pattern of racketeering activity," but it does not require unanimous agreement as to the specific predicate racketeering acts that make up the "pattern." The

jury's unanimous agreement that there are predicate racketeering acts constituting a "pattern" is sufficient to satisfy that element of the offense. For that reason, petitioner's claim (Pet. 13) that a specific unanimity instruction with respect to the predicate racketeering acts is required in a substantive RICO prosecution under 18 U.S.C. 1962(c) is mistaken.

This Court has consistently recognized that an indictment need not specify what means, among several named, was the method by which the crime was committed and that a jury need not agree upon a single means of commission. See *Griffin* v. *United States*, 502 U.S. 46, 49-51 (1991); *Schad* v. *Arizona*, 501 U.S. 624 (1991) (opinion of Souter, J.). As the plurality explained in *Schad*:

> In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

501 U.S. at 631-632 (opinion of Souter, J.) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)); accord 501 U.S. at 649 (Scalia, J., concurring in part and concurring in the judgment) ("[I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission."). In the case of RICO conspiracy prosecutions, it is sufficient that the jury unanimously agree that the defendant agreed to the commission of at least two predicate racketeering acts and that the predicate racketeering acts constituted a "pattern." The jury need not unanimously agree on which par-

ticular racketeering acts constituted that pattern. Cf. *United States* v. *Cauble*, 706 F.2d 1322, 1345 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).[6]

b. There is likewise no merit in petitioner's related claim (Pet. 14-16) that his RICO conspiracy conviction must be reversed because the jury may have relied on one of the four predicate acts for which the district court at sentencing found insufficient evidence. In *Griffin* v. *United States*, *supra*, this Court held that a conviction on a multiple-object conspiracy will be upheld if there is sufficient evidence to support at least one object, even if the general jury verdict does not identify which of the objects the jury found. Rather than speculate about how the jury arrived at its verdict, the Court made clear in *Griffin* that it is presumed under those circumstances that the jury convicted on the basis of the ground that was supported by evidence rather than on the ground for which there was insufficient evidence. 502 U.S. at 58-60. See also *Turner* v. *United States*, 396 U.S. 398, 420 (1970). In this

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[6] As petitioner points out (Pet. 13 n.6), the court in *Cauble* held that a failure to instruct the jury that it had to agree unanimously on the RICO predicate racketeering acts did not amount to plain error, but it suggested that giving such an instruction "might have been [the] better practice." 706 F.2d at 1345; see also *Griffin*, 502 U.S. at 51 (trial court may properly exercise its discretion to give a specific unanimity instruction, but the failure to do so does not render a conviction constitutionally invalid). The courts of appeals have generally encouraged the use of special verdicts or special interrogatories in RICO prosecutions. See, *e.g.*, *United States* v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984). To our knowledge, however, no court of appeals has held that a specific unanimity instruction with respect to the predicate racketeering acts is required.

case, the RICO conspiracy conviction was supported by sufficient evidence of seven of the 11 predicate racketeering acts. Those acts were sufficient to constitute a "pattern of racketeering activity."

2. Petitioner next contends (Pet. 16-17) that the district court erred in refusing to dismiss Count 1 of the indictment because the RICO conspiracy charge did not allege that he agreed personally to commit at least two predicate racketeering acts. That contention does not warrant this Court's review.

The crime of conspiracy typically requires proof of an agreement whose objective is the commission of one or more unlawful acts. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). There is no requirement that each conspirator agree that he will himself perform the illegal acts that constitute the conspiracy's objectives. On the contrary, a conspirator may be convicted upon a showing that he "agree[d] to participate in the conspiracy with knowledge of the essential objectives of the conspiracy." *United States* v. *Carter*, 721 F.2d 1514, 1528 n.21 (11th Cir.), cert. denied, 469 U.S. 819 (1984). See *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947) (law requires only "showing sufficiently the essential nature of the plan and [the conspirator's] connection[] with it").

In accordance with those basic principles of conspiracy law, the RICO conspiracy statute should be construed to require an agreement to participate in the conduct of an enterprise, with the understanding that the enterprise's affairs will be conducted through the commission of at least two criminal acts. There is no reason to believe that Congress intended to impose a more onerous standard under RICO than applies in conspiracy law generally and require each

conspirator to agree to commit specific criminal acts. Indeed, a requirement that each RICO conspirator agree to commit personally the requisite predicate acts would undermine the congressional objective of combatting organized crime because it would have the effect of exempting from coverage of the conspiracy provision those organized crime figures—like petitioner—shrewd enough to insulate themselves from particular criminal acts committed by their colleagues. See *United States* v. *Neapolitan*, 791 F.2d 489, 497-498 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986).

As petitioner points out (Pet. 16-17), the courts of appeals are divided on that issue. The majority of the circuits require only that a defendant agree with other conspirators that two predicate racketeering acts will be committed pursuant to the conspiracy. In early decisions addressing the issue, the First and Second Circuits stated that a RICO conspiracy conviction requires that the defendant agree personally to commit two predicate crimes. See *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir), cert. denied, 469 U.S. 831 (1984). The Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, however, have rejected those two early decisions and have refused to impose such a requirement. See, *e.g.*, *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 906, 971 (1985); *United States* v. *Pryba*, 900 F.2d 748, 760 (4th Cir.), cert. denied, 498 U.S. 924 (1990); *United States* v. *Joseph*, 781 F.2d 549, 554-555 (6th Cir. 1986); *United States* v. *Neapolitan*, 791 F.2d at 494-498; *United States* v. *Leisure*, 844 F.2d 1347,

1367 (8th Cir.), cert. denied, 488 U.S. 932, 960 (1988); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845, 848 (1984); *United States* v. *Rosenthal*, 793 F.2d 1214, 1228, modified on other grounds, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987).[7]

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[7] Contrary to petitioner's claim (Pet. 16), neither the Fifth Circuit nor the Tenth Circuit has definitively resolved the issue. In *United States* v. *Martino*, 648 F.2d 367, 382-383, vacated in part on other grounds, 650 F.2d 651 (5th Cir. 1981), cert. denied, 456 U.S. 943, 949 (1982), the court rejected the defendant's claim that prosecution for a RICO conspiracy and a substantive RICO violation in the same case violated the Double Jeopardy Clause's prohibition on multiple punishments for the same offense. In holding that the RICO conspiracy and the substantive RICO violation were not the "same offense," the court merely observed that "[a] RICO conspiracy charge requires the additional element of agreement; the defendant must have 'objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes.*'" *Id.* at 383 (quoting *United States* v. *Elliott*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978)). As the Eleventh Circuit explained in *United States* v. *Carter*, 721 F.2d at 1529-1531, neither *Martino* nor *Elliott* should be read to require that a defendant agree personally to commit the predicate racketeering acts. Several subsequent Fifth Circuit decisions have taken note of the issue, but have expressly declined to reach it. See *United States* v. *Faulkner*, 17 F.3d 745, 773-774, cert. denied, 115 S. Ct. 193, 663 (1994); *United States* v. *Williams*, 809 F.2d 1072, 1096 n.26, modified on other grounds, 828 F.2d 1, cert. denied, 484 U.S. 896, 913, 987 (1987); *United States* v. *Manzella*, 782 F.2d 533, 537 n.2, cert. denied, 476 U.S. 1123 (1986).

The Tenth Circuit similarly found it unnecessary to resolve the issue in *United States* v. *Killip*, 819 F.2d 1542, cert. denied, 484 U.S. 865, 987 (1987). In that case, the court observed

Although the First Circuit's decision in *Winter* contains some language contrary to the majority rule, the issue petitioner raises here was not presented in that case. The jury in *Winter* was instructed that conviction required an agreement to commit two predicate acts personally. The defendants argued on appeal that a RICO conspiracy requires more—proof that the defendants actually committed two predicate acts of racketeering. The First Circuit rejected that argument. The court's statement that a RICO conspiracy requires an agreement to commit two or more predicate acts personally is therefore dictum. The court had no occasion to consider the sufficiency of an agreement that co-conspirators commit the predicate acts. See 663 F.2d at 1135-1136.

Unlike the First Circuit in *Winter*, the Second Circuit in *Ruggiero* reversed a conviction for RICO conspiracy, but the court's analysis of the RICO conspiracy issue was not necessary to its decision. The issue of the proper construction of Section 1962(d) arose in connection with the appeal of defendant Tomasulo. The indictment charged Tomasulo with

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that it "ha[d] not decided the issue, but because of the trial court's instructions in this case, we do not reach it here." *Id.* at 1548. Subsequently, in *United States* v. *Sanders*, 929 F.2d 1466, 1473, cert. denied, 502 U.S. 846 (1991), the court stated that, "although th[e] issue may be ripe for reconsideration at a future time and upon an opportunity for fuller briefing by the parties, for purposes of this appeal we adopt the rule of law that the defendant must agree to personally commit two predicate acts, not merely agree to the commission of two predicate offenses by any conspirator." Given the tentative nature of the court's holding, and the fact that it expressly decided the issue only "for purposes of this appeal," the issue must be deemed open in the Tenth Circuit.

participating in a RICO conspiracy based on two predicate acts. The Second Circuit decided that one of the two predicate acts did not qualify as an act of racketeering at all. For that reason, the court concluded that Tomasulo's conviction was invalid without regard to whether he had agreed to commit that act himself or had simply agreed that the act would be committed by one of his co-conspirators. In either case, the agreement that he was alleged to have entered included only one of the requisite acts of racketeering and, accordingly, was not a violation of Section 1962(d). See 726 F.2d at 921.

The Court has consistently denied certiorari in cases raising this issue, and there is no reason for a different disposition here.[8] The *Ruggiero* and *Winter* courts did not have the benefit of the other court of appeals decisions that have adopted what has become the majority rule. Indeed, the *Ruggiero* court stated that it considered its construction of Section 1962(d) to be required by "[p]revailing case law." 726 F.2d at 921. Since that time, every circuit to address the issue has ruled contrary to *Ruggiero* and *Winter*. Because of the more recent case law, the First and Second Circuits might well reconsider

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[8] See *Winters* v. *United States*, cert. denied, 113 S. Ct. 83 (1992); *Pryba* v. *United States*, cert. denied, 498 U.S. 924 (1990); *Scotto* v. *United States*, cert. denied, 489 U.S. 1066 (1989); *Wougamon* v. *United States*, cert. denied, 488 U.S. 960 (1988); *Finestone* v. *United States*, cert. denied, 484 U.S. 948 (1987); *Stewart* v. *United States*, cert. denied, 480 U.S. 919 (1987); *Messino* v. *United States*, cert. denied, 479 U.S. 939 (1986); *Neapolitan* v. *United States*, cert. denied, 479 U.S. 940 (1986); *Adams* v. *United States*, cert. denied, 474 U.S. 971 (1985); *Tillie* v. *United States*, cert. denied, 469 U.S. 845 (1984); *Morris* v. *United States*, cert. denied, 469 U.S. 819 (1984).

their decisions when presented with an opportunity to do so.

3. Petitioner renews his contention (Pet. 17-19) that he was deprived of his Sixth Amendment right to confrontation when the district court prohibited the cross-examination of Patrick about the documents obtained from Patrick's former attorney, David Mejia. Petitioner does not directly challenge the finding of both courts below (Pet. App. 4a, 22a, 26a) that the documents obtained from Mejia fell within the scope of the attorney-client privilege.[9] Rather, he contends that his Sixth Amendment right of confrontation overrode Patrick's privilege. The court of appeals correctly rejected that contention.

The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal case the right

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[9] Petitioner asserts (Pet. 18) that Patrick's claim of privilege was "questionable" because the government, rather than Patrick, initially raised the objection. Following the evidentiary hearing, however, the district court found that "the attorney-client privilege was never explained to [Patrick] by Mr. Mejia and * * * Mr. Mejia never mentioned any possibility of waiver to Mr. Patrick." Pet. App. 22a. And as the court of appeals noted, Patrick testified at the evidentiary hearing that he did not authorize turning over the documents to petitioner's counsel. *Id.* at 3a; see also *id.* at 26a.

Petitioner also asserts (Pet. 18) that the district court failed to conduct a document-by-document analysis to justify its finding that each of the documents was privileged. The record contradicts that assertion. After the evidentiary hearing, the district court reviewed the documents in camera over the weekend before issuing its final ruling that petitioner would not be allowed to cross-examine Patrick with the documents. See Pet. App. 23a ("In reviewing these documents over the weekend and the case law over the weekend, I want to amplify what I said with regard to the attorney-client privilege.").

"to be confronted with the witnesses against him." That right entitles a defendant on cross-examination to probe the witness's motivation for testifying against the defendant. See, *e.g.*, *Olden* v. *Kentucky*, 488 U.S. 227, 231 (1988) (per curiam); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-679 (1986); *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974). At the same time, the Court has repeatedly emphasized that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam); see also, *e.g.*, *United States* v. *Owens*, 484 U.S. 554, 559 (1988). Thus, the Court has recognized that trial courts retain "wide latitude" to impose "reasonable limits" on cross-examination designed to impeach a witness. *Delaware* v. *Van Arsdall*, 475 U.S. at 679; see also *Michigan* v. *Lucas*, 500 U.S. 145, 149 (1991); *Davis* v. *Alaska*, 415 U.S. at 316.

The court of appeals did not hold that a defendant's right to effective cross-examination may never override a witness's claim of attorney-client privilege. The court merely held (Pet. App. 3a-6a) that, on the facts of this case, petitioner's right to effective cross-examination was not violated by the district court's limitation on his cross-examination. Thus, as petitioner appears to concede (Pet. 17-18), this case does not present the legal question whether the legitimate interests served by the attorney-client privilege are sufficiently strong to override a defendant's right to effective cross-examination in every case.

There is no merit in petitioner's contention (Pet. 18-19) that his Sixth Amendment right to effective cross-examination was violated on the facts of this

case by the district court's refusal to allow cross-examination on the documents protected by the attorney-client privilege. Patrick was cross-examined for three days on the terms of his plea agreement, the payments he had received from the government for his cooperation, and a series of matters that impeached his credibility, including the making of a false sworn statement regarding petitioner's involvement in the conspiracy. Gov't C.A. Br. (Under Seal) 27. As the court of appeals noted, Patrick admitted that he "had committed perjury on a number of occasions, had bribed politicians and police officers, had engaged in extortion and loansharking, and had committed six murders." Pet. App. 5a. Indeed, Patrick admitted that he was willing to lie on the stand in this case to stay out of jail. *Ibid.* Although petitioner argues (Pet. 18) that the privileged documents provided the only basis to confront petitioner with prior inconsistent statements about the charges in the indictment, the court of appeals properly found that those statements "would have added too little to the picture to warrant abrogating the attorney-client privilege." Pet. App. 5a. Because the jury received sufficient information to make a discriminating appraisal of Patrick's motives for testifying for the government, the Confrontation Clause was not violated when the district court refused to allow cross-examination on the documents protected by the attorney-client privilege. See *Jenkins* v. *Wainwright*, 763 F.2d 1390, 1392-1393 (11th Cir. 1985), cert. denied, 476 U.S. 1164 (1986); *United States ex rel. Blackwell* v. *Franzen*, 688 F.2d 496, 501-502 (7th Cir. 1982), cert. denied, 460 U.S. 1072 (1983).

4. Petitioner also contends (Pet. 19-21) that the district court improperly departed upward from the presumptive Guidelines range.

Under 18 U.S.C. 3553(b), a district court may depart from the Guidelines range only when the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." See *Williams* v. *United States*, 503 U.S. 193, 198 (1992); *Burns* v. *United States*, 501 U.S. 129, 133 (1991). In this case, the district court relied on two independent grounds when it departed upward from the Guidelines range through a two-level increase in petitioner's offense level: the threats made against family members of the victims of the extortion scheme, and petitioner's participation in an organized crime venture. Pet. App. 46a.

Contrary to petitioner's claim (Pet. 20), the court of appeals did not improperly "switch[]" the first ground of departure from threats against the family members of the victims to threats of bodily injury against the victims themselves in order to uphold the departure. Rather, in ruling that "[i]t can make no difference that the threats against the members of the families of the extortion victims were not communicated directly to those family members," the court simply rejected petitioner's argument that a departure was unjustified unless the threats against family members were communicated directly to them. Pet. App. 8a. Because the 1987 version of the extortion guideline, Guidelines § 2B3.2, applied by the district court did not take into account such threats,

the court of appeals properly upheld the departure on that ground.[10]

In any event, the alternative ground relied upon by the district court—petitioner's membership in organized crime—provided a proper ground for a departure. Contrary to petitioner's claim (Pet. 20-21), the mere fact that Guidelines § 2E1.1 provides that the offense level for a RICO offense is the higher of 19 or the offense level applicable to underlying racketeering activity does not preclude a departure based on petitioner's membership in the Chicago Outfit. As the court of appeals noted in expressly rejecting petitioner's claim, Section 2E1.1 applies to all persons convicted of a RICO offense, not just to members of organized crime. Pet. App. 9a. The court pointed out that the Chicago Outfit was "a criminal syndicate of extensive scope and extraordinary durability—one of the oldest and most notorious criminal enterprises in the United States." *Ibid.*[11] Because "[t]he Chicago Outfit is the clearest possible example of a gang operating on such a scale, with such success, over such a long period of time that the dan-

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[10] Section 2B3.2 was subsequently amended to authorize a two-level adjustment in the offense level for "an express or implied threat of death, bodily injury, or kidnapping." See Guidelines § 2B3.2(b)(1) (Nov. 1, 1994); United States Sentencing Comm'n, *Guidelines Manual*, App. C, amend. 366, at 186 (Nov. 1, 1991). As the court of appeals pointed out, "[t]he addition of the adjustment shows that the previous guideline omitted a factor relevant to sentencing under the scheme of the guidelines, and it is precisely (and only) such an omission that is a proper basis for a departure." Pet. App. 8a.

[11] As the court of appeals observed, the leadership of the Chicago Outfit has been traced back to Al Capone. Pet. App. 1a-2a.

ger which it poses to society is not adequately reflected in the guideline range," the court properly concluded that an upward departure was justified. *Id.* at 9a-10a.

5. Finally, petitioner renews his contention (Pet. 21-22) that the district court erred in declining to hold an evidentiary hearing to determine his competency to stand trial. The court of appeals correctly rejected that contention.

There is no merit in petitioner's claim (Pet. 21-22) that the courts below erred in disregarding the affidavits of his lawyers in concluding that there was no "reasonable cause" under 18 U.S.C. 4241(a) to believe that petitioner was incompetent to stand trial. While *Drope* v. *Missouri*, 420 U.S. 162 (1975), noted that "an expressed doubt [as to the defendant's competence] by one with 'the closest contact with the defendant' is unquestionably a factor which should be considered" in determining whether a competency examination should be ordered, the Court made clear that it "[was] not, of course, suggest[ing] that courts must accept without question a lawyer's representations concerning the competence of his client." *Id.* at 177 n.13 (citation omitted). In this case, petitioner had already been examined by four psychological experts before his trial lawyers submitted their affidavits, and none of the experts found him to be incompetent. On the contrary, two experts found that petitioner was competent to stand trial, while the other two did not specifically address the statutory standard to determine competence. Moreover, "even one of the reports submitted on behalf of [petitioner] described his 'neurological and cognitive performance' as falling 'within normal limits.'" Pet. App. 7a. Thus, as the district court noted, the affi-

davits of petitioner's trial lawyers were "in conflict with the credible medical evidence in this case." *Id.* at 18a.[12] In those circumstances, the district court was entitled to conclude that there was no "reasonable cause" to question petitioner's competency to stand trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1995

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[12] Petitioner's reliance (Pet. 21) on *Medina* v. *California*, 112 S. Ct. 2572 (1992), to support his claim is misplaced. In that case, the Court held that it does not violate the Due Process Clause to require a defendant who alleges his incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence. Although the Court noted in passing that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense" (*id.* at 2580), nothing in *Medina* suggests that the claim of a defendant's lawyer that his client is incompetent is sufficient by itself to require a competency hearing when that claim is contradicted by expert psychiatric evidence.

Petitioner also complains (Pet. 22) that the courts below engaged in a "selective reading" of the medical reports and disregarded information in those reports suggesting his incompetence to stand trial. Those fact-bound claims plainly do not warrant this Court's review.

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No. 94-1334

IN THE

Supreme Court of the United States

October Term, 1994

GUS ALEX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Petitioner Gus Alex respectfully submits the following points in reply to the Brief for the United States in Opposition ("Gov't Br.").

1. In the petition, we argue that the verdict against Mr. Alex violates the Fifth Amendment Due Process Clause and the Sixth Amendment because the district court refused Alex's request that the jury be instructed that all twelve jurors had to agree

unanimously on which two predicate acts Alex agreed some member of the conspiracy would commit. (Petition at 12-14.)

In response, while the government concedes that a "pattern of racketeering activity," as defined in 18 U.S.C. § 1961(5), is an element of a RICO offense under both Sections 1962(c) and (d) (Gov't Br. at 10), the government nonetheless argues that neither Section 1962(c) nor (d) requires unanimous jury agreement on the predicate acts. The government asserts that the predicate acts are merely the means by which the RICO crime is committed rather than an element of the crime (Gov't Br. at 10-12), but cites no authority for this proposition. Neither this Court nor any other has analyzed the unanimity issue in the context of the RICO statute. In a different but instructive context, however, the Third Circuit recently rejected the government's argument.

In *United States v. Edmonds*, Nos. 93-1890, 93-1914, 93-1920, 93-1947, 1995 U.S. App. LEXIS 8850, at *3 (3d Cir. April 18, 1995), the Third Circuit reversed a conviction under 18 U.S.C. § 848 (the "CCE statute") where the district court refused to instruct the jury that it must agree unanimously which of the alleged violations constituted the "continuing series of violations." The court noted that the term "continuing" in the CCE statute means that the three violations must be related and held that the "required underlying criminal acts, including their 'relatedness,' are 'facts necessary to constitute the crime' -- not merely immaterial means -- and therefore must be proven individually." *17 (citing *In re Winship*, 397 U.S. 358, 364 (1970)). The court said (*16):

> We do not know that the jury unanimously agreed that Edmonds participated in a single set of events that met all of the elements of the statutory definition. Because no event can meet the statutory criteria unless the distribution involved was related to two or more other distributions, the district court's charge leaves us without the requisite assurance that no juror had a reasonable doubt concerning Edmonds' guilt of the

> CCE charge. A juror may have had a reasonable doubt about the "relatedness" of one or more of the events that his or her colleagues thought constituted a series of three related drug offenses.

The court noted its disagreement with the Seventh Circuit's holding in *United States v. Canino*, 949 F.2d 928, 947-48 (7th Cir. 1991), *cert. denied*, *United States v. Flynn*, 503 U.S. 996, and *cert. denied*, 504 U.S. 910 (1992). The court observed that the Seventh Circuit has held that (*18 and *19) "the predicate offenses making up a 'continuous series' of violations and their 'relatedness,' . . . are immaterial 'means' and not material elements of the crime requiring specific juror agreement." As to its disagreement with the Seventh Circuit, the court stated (*19):

> The relevant point is not, as the Seventh Circuit views it, whether a person who commits three related drug violations with the requisite sized group on May 12th, 13th and 14th of a given year is as culpable as if he or she commits similar violations with the requisite sized group on June 12th, 13th, and 14th. The relevant point is that a person cannot be held criminally responsible if half of the jury believes the defendant committed the conduct described by the statute on May 12th, 13, and 14th, but not in June, and the other half believes the defendant committed the conduct described by the statute on June 12th, 13th, and 14th, but not in May. Cf. Schad. 501 U.S. at 651 (Scalia, J., concurring) (stating that "moral equivalence" would not justify upholding an assault conviction where a portion of the jury may have believed the defendant assaulted X on Tuesday, while the other half may have believed the defendant assaulted Y on Wednesday).

The rationale of *Edmonds* applies with equal force to RICO's pattern of racketeering activity requirement. As the government notes, to constitute a "pattern of racketeering activity"

the predicate acts must be "related" and "amount to or pose a threat of continued criminal activity." (Gov't Br. at 10.) Without unanimity as to the predicate acts, it is impossible to conclude that no juror had a reasonable doubt as to the relatedness of one or more of the predicate acts or whether the specific predicate acts indicated the threat of continued criminal activity. The circumstances under which a defendant is entitled to a unanimity instruction is an issue of fundamental, constitutional significance, and one which has divided the courts of appeal in non-RICO cases. The Court should grant the petition to provide the necessary amplification and guidance on this issue.

2. We ask the Court to resolve a conflict among the circuits as to whether a conspiracy to violate Section 1962(c) requires proof that the defendant agreed personally to commit at least two predicate acts. (Petition at 16-17.) The government acknowledges that the circuit courts are divided on this question. The government nevertheless urges the Court not to resolve the conflict and speculates that two of the circuits holding that the defendent must agree personally to commit two racketeering acts, the First and Second, would likely reconsider the decisions in *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983) and *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied sub nom., Rabito v. United States*, 469 U.S. 831 (1984), if presented with the same issue today. (Gov't Br. at 13-18.)

The government's acknowledgement that the circuits are divided on the issue is sufficient cause for the Court to grant the petition. (Gov't Br. at 14.) The government's speculation that the First and Second Circuits would "reconsider" their prior decisions is baseless, particularly in light of subsequent decisions in both circuits reaffirming that the defendant must agree to commit personally two acts of racketeering. *Feinstein v. Resolution Trust*

Corp., 942 F.2d 34, 41 (1st Cir. 1991); *United States v. Rastelli*, 870 F.2d 822, 828 (2d Cir.), *cert. denied*, 493 U.S. 982 (1989).[1]

The government also suggests that the Court need not grant the petition on this issue because the Court has refused to consider the issue in the past. (Gov't Br. at 17 n.8.) That fact militates for rather than against review by the Court now. This issue continues to arise, and should be resolved because of the nebulous nature of RICO conspiracy law and charging theories used by prosecutors, where defendants such as Mr. Alex are charged with RICO conspiracy but not a substantive RICO offense.

The government's primary argument is that the rule we urge, one which would require agreement to commit two predicate racketeering acts personally, "impose[s] a more onerous standard under RICO than applies in conspiracy law generally." (Gov't Br. at 13.) To support its argument, the government selectively recites *one* element of so-called "general" conspiracy law, an agreement by the conspirator. (*Id.*) Another basic principle of conspiracy law, ignored by the government, is the overt act requirement. The RICO conspiracy statute does not require an overt act and for that reason exposes defendants to a conspiracy charge for nothing more than a conversation construed as an "agreement." As the First Circuit observed, Congress intended the rule that the defendant personally agree to commit two racketeering acts to "provid[e] sufficient protection to those who might otherwise be convicted through guilt by association." *Winter*, 663 F.2d at 1136.

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[1]The government also argues that "the Tenth Circuit has [not] definitively resolved the issue." (Gov't Br. at 15 n.7.) The government's tenuous argument, which the Court should reject, is contradicted by the fact that the Tenth Circuit applied the rule that the defendant must agree to commit personally at least two predicate acts and used it to reverse convictions in both *United States v. Killip*, 819 F.2d 1542,1547-48 (10th Cir.), *cert. denied sub nom., Marr v. United States*, 484 U.S. 865 (1987), and *United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir.), *cert. denied*, 502 U.S. 846 (1991).

3. We ask this Court to resolve the question as to whether, in light of the facts here, Alex's Sixth Amendment right of confrontation should override Patrick's claim of attorney-client privilege. (Petition at 17-19.) In response, the government asserts that we do not contest the finding of privilege by the district court and Court of Appeals; that there is no reason for this Court to decide this issue because Patrick was extensively cross-examined; and that the Court of Appeals correctly concluded that Patrick's inconsistent statements as reflected in the so-called Mejia documents about the charges in the indictment "would have added too little to the picture to warrant abrogating the client-privilege." (Gov't Br. at 19-20.) The government is wrong on all scores.

Contrary to the government's argument, we directly challenge the finding that the Mejia documents were within the scope of Patrick's attorney-client privilege. The fact that, as the government points out, the district court *may* have looked at each document does not mean that the government established, as the law requires, each element of the privilege as to each document. (Petition at 18.)

Even if the Mejia documents are privileged, Alex's Sixth Amendment right of confrontation nevertheless overrides Patrick's attorney-client privilege. The Mejia documents contain assertions by Patrick of FBI coercion and therefore impeach Patrick's credibility.[2] *See United States v. Boyd*, 833 F. Supp. 1277, 1362-

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[2]In a case like this one, where evidence critical to the prosecution came from a witness who translated a taped conversation, the Seventh Circuit recently recognized the potentially devastating impact of cross-examination that impeaches the translating witness when it affirmed the reversal of a conviction and grant of a new trial. The court (speaking through the same Judge who wrote the Alex opinion) said:

> Although the testimony of the six prisoner witnesses for the prosecution was corroborated, had their testimony been disbelieved the defendants would have had to be acquitted on most counts. It is true that the government introduced a number of taped

1364 (N.D. Ill. 1993) (court held that cross-examination related to the witnesses' "conduct subsequent to becoming cooperating witnesses" was not "merely cumulative").

The Mejia documents also contain material which contradicts Patrick's testimony on matters directly related to the indictment charges. The Mejia documents impeach Patrick's testimony that he (Patrick) received certain extortion proceeds that he testified he gave to Alex. *See United States ex rel. Ashford v. Director, Illinois Department of Corrections*, 871 F.2d 680, 683 (7th Cir. 1989) (court recognized importance of the right of

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> conversations that were highly incriminating of the defendants, but these tapes were translated by witness Harris and their meaning was thus conveyed to the jury through his testimony. If the jury hadn't believed him, it would not have been impressed by the tapes. And without the tapes, the testimony of the prisoner witnesses was essential on most of the counts of which the defendants were convicted.
>
> * * *
>
> The reason the concealed evidence might well have made a difference was that the witnesses had claimed to have "seen the light" when, having been arrested and sentenced or threatened with severe punishment for their activities as El Rukns, they had decided to cooperate with the government. That had been in 1985. Six years later they were still dealing drugs, stealing, smuggling, violating jail rules, and lying on the stand. Had these things been known to the jury it might have doubted their testimony that they had "seen the light." Knowing that they were lying under oath about their using and dealing in drugs, the jury might reasonably have supposed that they were lying about the criminal activities of the defendants as well.

United States v. Boyd, No. 95-1050, 1995 U.S. App. LEXIS 10468, at *18-20 (7th Cir. May 10, 1995). If the court substitutes "Patrick" for "prisoner witnesses" and "Harris," the Seventh Circuit has articulated in a compelling fashion the precise argument advanced by Mr. Alex. The divergent positions taken by the Seventh Circuit in the two cases reinforces the concern raised by Mr. Alex in his petition for rehearing in the court below - result-oriented decision making.

confrontation as to "testimony on direct [as distinguished from collateral] matters."). The Sixth Amendment entitles Mr. Alex to put his case to a jury having the benefit of all relevant information.

4. In the petition, we argue that this Court should grant the petition to consider whether the Court of Appeals erred in affirming the upward departure imposed by the district court on two alternative grounds. We argue that (a) the Court of Appeals improperly affirmed on a ground that the district court implicitly rejected as a basis for an upward departure and (b) the alternative ground relied upon by the district court is an improper basis for a departure because the grouping analysis of the RICO statute already enhances the penalty for organized crime membership. (Petition at 19-21.)

As to the first ground for departure, threats *to* (not *against* as the government claims) the victims' family members, the government incorrectly asserts that "the court simply rejected petitioner's argument that a departure was unjustified unless the threats against family members were communicated directly to them." (Gov't Br. at 21.) Apparently, the government is attempting to show that the Court of Appeals affirmed on the ground used by the district court -- threats to the family members -- even though there was no evidence of such threats. But the government's assertion is belied by the opinion of the Court of Appeals, which states (Pet. App. 8a):

> ...[T]here is no indication that the victims of the defendant's extortions told their families about the threats. But it does not matter. The extortion victims themselves, such as Moss, were also threatened with physical injury; the mention of their families merely magnified the threats.

Taken in context, it is clear from the opinion that the Court of Appeals agreed with Mr. Alex that no record support existed for the ground for departure relied upon by the district court -- threats

to family members -- and instead affirmed on a ground rejected by the district court.

The government misstates our argument on the organized crime issue. According to the government, we claim that the law prohibits an upward departure for involvement in organized crime because ". . .Guidelines § 2E1.1 provides that the offense level for a RICO offense is the higher of 19 or the offense level applicable to underlying racketeering activity. . . ." (Gov't Br. at 22.) Contrary to the government's assertion, we do not argue that the RICO base offense level already accounts for organized crime membership. Instead, we argue that the courts below erred because the grouping analysis, which enhances the offense level for such things as being a leader of a criminal enterprise having more than four members, already accounts for organized crime membership. For this reason, an upward departure for organized crime involvement is improper.

5. In the petition, we argue that the district court erred when it struck the affidavits of Mr. Alex's trial lawyers and when it refused to hold a pre-trial competency hearing. In response, the government asserts that "none of the experts found [Mr. Alex] to be incompetent" and that "two experts found that petitioner was competent to stand trial." (Gov't Br. at 23.) The government's response misstates the record and evades the real issue, which is that the district court improperly struck the affidavits of Mr. Alex's trial lawyers and failed to hold a competency hearing in the face of evidence raising a reasonable question as to Mr. Alex's competence. The government's argument is misleading in two significant respects.

First, two experts did not find Mr. Alex competent. One expert found Mr. Alex competent; another said "that there is insufficient data to conclude that he is unable to understand the nature and consequence of the proceedings against him or unable to assist properly in his defense." (App. 128.) Second, the fact that, as the government asserts, the affidavits conflicted with *some*

of the medical evidence does not justify striking the affidavits. The affidavits were consistent with the medical evidence calling Mr. Alex's competency into question, and under the law the courts below erred by striking the affidavits and failing to hold a hearing.

Respectfully submitted,

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